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1327 United States 1327  
**Circuit Court of Appeals**  
**For the Ninth Circuit.** /

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CLEM ROGERS,

Appellant,

vs.

BRIX BROS. LOGGING COMPANY, a Corpora-  
tion,

Appellee.

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**Transcript of Record.**


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Upon Appeal from the United States District Court for the  
District of Oregon.

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**FILED**  
OCT 5 - 1922  
**F. D. MONCKTON,**  
CLERK





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

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For the Appellant.

G. C. & A. C. FULTON, Astoria, Oregon, and  
CAREY & KERR and OMAR C. SPENCER,  
Yeon Building, Portland, Oregon,

For the Appellee.

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In the District Court of the United States for the  
District of Oregon.

IN EQUITY—No. —.

BRIX BROS. LOGGING CO, a Corporation,  
Plaintiffs,

vs.

CLEM ROGERS,

Defendant.

**Citation on Appeal.**

United States of America,—ss.

To the Above-named Complainant, Brix Bros. Logging Co., a Corporation, and Its Attorneys of Record, Messrs. Carey & Kerr and G. C. Fulton:

You are hereby notified that, in a certain case in equity in the District Court of the United States for the District of Oregon wherein said Brix Bros Logging Co. was complainant and Clem Rogers was defendant, an appeal has been allowed the



defendant therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Hon. R. S. BEAN, United States District Judge for the District of Oregon, this 27th day of June, 1922.

R. S. BEAN,  
United States District Judge for the District of  
Oregon. [1\*]

Service of the within citation on appeal by certified copy at Portland, Oregon, this 27th day of June, 1922, is hereby admitted.

CAREY & KERR,  
Of Attorneys for Complainant, Brix Bros. Logging  
Co. [2]

[Endorsed]: No. E—8496. 25--87. In the District Court of the United States for the District of Oregon. In Equity. Brix Bros. Logging Co., Plaintiff, vs. Clem Rogers, Defendant. Citation on Appeal. Filed in the U. S. District Court, District of Oregon. Filed Jun. 27, 1922. G. H. Marsh, Clerk.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for  
the District of Oregon.

November Term, 1919.

BE IT REMEMBERED that on the 8th day of  
December 1919, there was duly filed in the District  
Court of the United States for the District of Ore-  
gon, a transcript of record on removal from the  
Circuit Court of the State of Oregon for Clatsop  
County; that the complaint contained in said tran-  
script of record was in words and figures as follows,  
to wit: [3]

In the Circuit Court of the State of Oregon for  
Clatsop County.

BRIX BROS. LOGGING CO., a Corporation,  
Plaintiff,

vs.

CLEM ROGERS,  
Defendant.

### **Complaint.**

The above-named plaintiff complaining of the  
above-named defendant for its cause of suit al-  
leges:

#### **I.**

That plaintiff is now, and at and during all the  
times herein mentioned was, a private corpora-  
tion duly organized and existing under and by  
virtue of the laws of the State of Washington, and  
authorized to and engaged in the general logging

business and in the manufacture and sale of saw-logs in the County of Pacific, in the State of Washington.

## II.

That heretofore, and on the 28th day of November, 1917, the defendants herein, together with F. Dohrman, Jr., Chas. W. Corbaley, J. W. McDonald, Jr., F. K. Eckley, J. J. O'Toole, I. Fuendeling, M. Mannix, C. H. Caulfield, Emmet B. Gavin and A. P. Schmidt, duly organized under the laws of the State of Nevada a corporation by the name of Oregon Pacific Mill and Lumber Company, and the said Oregon Pacific Mill and Lumber Company is, and ever since said date has been, a corporation duly organized and existing under and pursuant to the laws of the State of Nevada. That upon the organization of said corporation, the following officers of such corporation were duly elected and qualified as such, that is to say:

F. Dohrman, Jr., Chas. W. Corbaley, J. W. McDonald, Jr., F. K. Eckley, J. J. O'Toole, I. Fuendeling and the defendant herein [4] were each elected directors of said organization, and each duly qualified as such on the 4th day of December, 1917, and thereafter continued to act as such, and ever since have been and still are directors of said corporation.

That at the first meeting of of the directors of said Oregon Pacific Mill and Lumber Company, the said F. Dohrman, Jr., was elected President of said corporation, Chas. W. Corbaley, Vice-President, J. W. McDonald, Jr., Secretary, and the said



defendant herein Clem Rogers was elected Treasurer, and each of said parties is now, and ever since has been, such officers and directors of said corporation, and each was such at and during all the times herein mentioned.

That after said corporation had been formed, the said corporation duly caused to be filed in the office of the Corporation Commissioner of the State of Oregon its declaration of its intention to transact business in Oregon, all in due form and in accordance with the laws of the State of Oregon, and also filed therewith in said office a copy of its Articles of Incorporation duly certified to by the Secretary of State of the State of Nevada, in due form and accordingly as required by the laws of the State of Oregon, and also at the same time filed in said office a power of attorney, duly executed and acknowledged, as required by law, appointing one Allan A. Hall attorney-in-fact for such corporation, who was and is thereby authorized and empowered to accept and receive service of all process, summons, suits and actions instituted against such corporation in Oregon and upon whom service of all process, summons, suits and actions against such corporation should be made.

That said documents above mentioned were filed in the office of the Corporation Commissioner on the 16th day of January, 1918, and thereupon there was issued to said Oregon Pacific Mill and Lumber Company a license to transact and engage in business [5] within the State of Oregon.

That according to the Articles of Incorporation of said Oregon Pacific Mill and Lumber Company, it was authorized and empowered to engage generally in the business of purchasing, acquiring and operating sawmills and sawmill plants for profit, and engaged generally in the lumber and other business.

### III.

That during the month of January, 1918, the said Oregon Pacific Mill and Lumber Company began the operation of a sawmill plant at the city of Astoria, in Clatsop County, in the State of Oregon, and operated and maintained said sawmill plant under lease or contract from the defendant herein, the exact nature of which is to the plaintiff unknown. That said sawmill plant was operated from the said — day of January, 1918, up to and until the — day of November 1918, when operations ceased.

That during the month of August, 1918, this plaintiff, at the instance and request of said Oregon Pacific Mill and Lumber Company, sold and delivered to such corporation a large amount of spruce logs, for which said corporation promised and agreed to pay plaintiff the sum of \$15,136.39, but paid no part thereof. That said spruce logs were used and employed by said Oregon Pacific Mill and Lumber Company at its said sawmill plant at Astoria, Oregon, and were sawed up into lumber and sold and disposed of, and the proceeds thereof collected by the said defendant herein and

not paid over to to the corporation Oregon Pacific Mill and Lumber Company.

That during the operation of said sawmill, the said Oregon Pacific Mill and Lumber Company had entered into a contract with the United States Spruce Production Corporation, as well as the United States Government, to manufacture at its mill spruce lumber for government use, and manufacture and deliver to said [6] United States Government and said United States Spruce Production Corporation considerable spruce lumber.

That the said Oregon Pacific Mill and Lumber Company closed its operations on or about said November 11, 1918, as aforesaid, and never transacted any further business but went out of business entirely. That when said Oregon Pacific Mill and Lumber Company closed its operations on said date aforesaid, its assets consisted of a considerable quantity of manufactured lumber on hand and a claim against the United States Government and the United States Spruce Production Corporation, in excess of \$190,000.00, the exact value of the assets of the said corporation being to plaintiff unknown. That immediately upon said corporation closing down its mill and ceasing to transact business, and on or about the 11th day of November, 1918, for the purpose of cheating and defrauding its creditors, particularly the plaintiff herein, the said Oregon Pacific Mill and Lumber Company, without any consideration to it paid or received and without any consideration whatever, assigned its said claim of \$190,000.00 against the



United States Spruce Production Corporation and the United States, together with its entire assets, including lumber and material on hand, to the defendant herein.

Thereupon, the defendant proceeded to and did present his claim against the United States Spruce Production Corporation and also the Contract Board, a board created by the United States for the purpose of settling controversies arising out of war conditions, including the claim of said Oregon Pacific Mill and Lumber Company for \$190,000.00, and there was paid to the said defendant herein and by him received from the United States Government on said claim aforesaid \$75,000.00 and more, which sum the said defendant received and has appropriated to his own use and without any consideration whatever, and the said defendant has also converted to his own use all of the assets of said corporation, [7] rendering the same entirely insolvent, and still holds the same in his possession and refuses to satisfy the debts of said corporation, and refuses to satisfy the claim of plaintiff herein.

That at the time said assignment was made to said defendant herein, and at the time said defendant herein received from said corporation all of its assets as aforesaid, such defendant was a director in said corporation and was the Treasurer thereof and used and employed the said assets of said corporation to further his own interests.

#### IV.

That heretofore, and on the 17th day of July, 1919, by consideration of the above-entitled Court

in an action therein instituted by the plaintiff herein against the said defendant Orgeon Pacific Mill and Lumber Company, and pursuant to due and legal proceedings therein had, a judgment was entered in such action in favor of the plaintiff herein and against the said Oregon Pacific Mill and Lumber Company, in the sum of \$15,864.97, together with the costs and disbursements of such action therein taxed at \$22.50. That said judgment was duly entered in the docket of liens for said County, and no part of the same has been paid, excepting there was paid thereon August 29, 1919, the sum of \$1,133.46, leaving due, owing and unpaid thereon, the sum of \$14,754.01, together with interest thereon at the rate of 6% per annum from said August 29, 1919, until paid.

That heretofore, and on the 4th day of September, 1919, plaintiff caused an execution to be issued upon such judgment in due form of law, and placed the same in the hands of the Sheriff of said County for service and execution. That said Sheriff has heretofore, and on the — day of September, A. D. 1919, returned said execution to the Clerk of this Court, with his certificate endorsed thereon to the effect that after diligent search and inquiry [8] he had been unable to find any property belonging to the said Oregon Pacific Mill and Lumber Company, and returned said execution wholly unsatisfied.

#### V.

That plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, by reason of the premises, plaintiff demands judgment and decree—

First. That the said defendant herein be required to file his answer herein and set forth therein the amount of money he received and the amount of property by him received from said corporation Oregon Pacific Mill and Lumber Company, and also what other property belonging to said corporation Oregon Pacific Mill and Lumber Company has come to his possession, and make full disclosure thereof.

Second. That said assignments and transfers, and each thereof, of said properties, and the whole thereof, the said claims and accounts be adjudged and decreed to have been fraudulent as to the plaintiff herein, and for the purpose of cheating and defrauding the creditors of said corporation Oregon Pacific Mill and Lumber Company, and was and is void as to the plaintiff herein.

Third. That defendant be, by decree of this Court, directed to pay over to plaintiff herein a sum sufficient to satisfy the said judgment obtained by plaintiff against said Oregon Pacific Mill and Lumber Company in full, together with interest thereon, together with the costs and disbursements of this suit.

Fourth. That plaintiff have judgment against the said defendant herein for the sum of \$14,754.01, together with interest thereon at the rate of 6% per annum from the 29th day of August, 1919, until paid, together with the costs and disbursements of this suit.

Fifth. That plaintiff have such other and further decree [9] in the premises as to this Honorable Court may seem equitable and just.

G. C. & A. C. FULTON,

Attorneys for Plaintiff.

In the Circuit Court of the State of Oregon for Clatsop County. Filed November 12, 1919. J. C. Clinton, Clerk. [10]

---

AND AFTERWARDS, to wit, on the 15th day of July, 1920, there was duly filed in said District Court of the United States for the District of Oregon, the first amended answer of defendant, in words and figures as follows, to wit: [11]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. —.

BRIX BROS. LOGGING COMPANY, a Corporation,

Plaintiff,

vs.

CLEM ROGERS,

Defendant.

**First Amended Answer.**

Comes now the defendant and by leave of this Court first had and obtained files his first amended answer to the original complaint herein, and for



answer thereto admits, denies and alleges as follows:

### I.

This defendant denies that he, with the others named in said complaint, or otherwise or at all, on the 28th day of November, 1917, or at any time, duly or at all, organized a corporation by the name of Oregon Pacific Mill and Lumber Company, or that I. Feundeling is or ever was a director of the said company, or that this defendant was elected a director of said corporation upon its organization, or at any time prior to the third day of June, 1918, or that he qualified to act or acted as a director thereof prior to said third day of June, 1918.

Defendant denies that Chas. W. Corbaley is or since the 24th day of September, 1918, has been an officer or director of said Oregon Pacific Mill and Lumber Company, or that J. W. McDonald, Jr., is or since September 24, 1918, has been an officer or director of the said corporation.

Defendant further denies that the defendant was elected treasurer of the said corporation at the first meeting of its directors or of its board of directors, or at all, except that he admits that at a meeting of the board of directors of said company, held on the second day of January, 1918, he was elected treasurer of said company, and that he, during all the times herein mentioned, acted as the treasurer thereof. [12]

### II.

Defendant denies that said Oregon Pacific Mill and Lumber Company operated or maintained a

sawmill plant in Clatsop County, Oregon, at any time after September 1, 1918, but admits and alleges the fact to be that in January, 1918, said Oregon Pacific Mill and Lumber Company began the operation of a sawmill plant at or near the City of Astoria, Clatsop County, Oregon, and continued to operate and maintain said sawmill from some time in January, 1918, until August 30, 1918.

### III.

Defendant denies that any moneys or credits of the said company coming into his hands or possession were not paid over to said corporation or duly accounted for to it by him. Defendant furthermore denies that said company has gone out of business or ceased to transact business, although he admits that no sawmill operations have been conducted by it since about the first day of September, 1918.

### IV.

Defendant denies that said corporation on November 11, 1918, or at any other time, assigned or transferred to him all or any of its property or assets, except as hereinafter expressly admitted; and furthermore denies that any such transfers or assignments were without consideration, or that they were made for the purpose of cheating or defrauding any of the creditors of said company or the plaintiff herein; and the defendant alleges the fact to be that long prior to the month of August, 1918, said Oregon Pacific Mill and Lumber Company, for the purpose of securing certain advances made to it or for its account by this defendant, and to in-

demnify him against loss on account of credit extended to and for the account of said company, and on account of the obligations assumed by this defendant for [13] the benefit of said company, caused to be assigned and transferred unto this defendant said sawmill in Clatsop County, Oregon, together with the buildings, machinery, tools, implements and equipment used in connection therein, and also its said timber lands in said Clatsop County, Oregon; and that on or about the eighth day of October, 1918, in partial satisfaction of its then indebtedness to this defendant, secured as aforesaid, said Oregon Pacific Mill and Lumber Company did, for a valuable consideration, absolutely sell, assign, transfer and convey unto this defendant all of said timber lands and said sawmill with the buildings, machinery, tools, implements and equipment used in connection therein. This defendant has heretofore, and prior to the institution of this suit, with the consent of said company, taken possession and ever since has been and now is in possession of all of said property. The advances thus made by defendant to said company or for its account amounted to the sum of three hundred and forty-five thousand dollars (\$345,000.00), of which a considerable amount still remains due and payable and unpaid.

V.

Further answering the complaint herein, this defendant admits that said Oregon Pacific Mill and Lumber Company did assign to him its claim against the United States Spruce Production Cor-

poration and the United States of America, and that this defendant did present said claim to the United States Spruce Production Corporation and also to the Contract Board, a board created by the United States for the purpose of settling the controversies arising out of war contracts, but denies that he received the sum of \$75,000.00, or any sum whatsoever, in settlement or in partial settlement, or on account of any such claim, and alleges the fact to be that said claim was disallowed *in toto* on the ground and for the alleged reason on the part of the United States Spruce [14] Production Corporation and the United States that the contract between said Oregon Pacific Mill and Lumber Company and the United States of America and/or the United States Spruce Production Corporation had been cancelled and rescinded by and with the consent of the Oregon Pacific Mill and Lumber Company, and that there was nothing due upon said claim.

## VI.

Defendant denies that he has converted to his own use, or at all, any or all of the assets of said company, or that he now has in his possession, or that at the time of the institution of this suit he had in his possession, any monies received by or paid to him on account of any such claim and further denies that he has converted, misappropriated or otherwise misapplied all or any of the assets of said Oregon Pacific Mill and Lumber Company.

## VII.

This defendant, further answering the complaint



herein, suggests that the bill of complaint is defective in that it fails to join as a party defendant herein said Oregon Pacific Mill and Lumber Company, a Nevada corporation.

WHEREFORE, this defendant prays that this suit be dismissed and that the defendant have and recover his costs and disbursements herein of and from the plaintiff. [15]

---

AND AFTERWARDS, to wit, on the 12th day of December, 1921, there was duly filed in said court, an opinion, in words and figures, as follows, to wit: [16]

### **Opinion.**

Portland, Oregon, December 12, 1921.

Memorandum by BEAN, District Judge, on Merits:

In November, 1917, the Oregon Pacific Mill and Lumber Company was organized as a corporation by residents of California under the laws of Nevada, to engage in the manufacture and sale of lumber in Oregon. It thereupon acquired a mill and other properties in Clatsop County in this state, and on December 22, 1917, entered into a contract with the Signal Corps, United States Army (hereinafter referred to as "the government"), to manufacture and deliver to it ten million feet of spruce lumber within the period of eighteen months at the rate of 560,000 feet per month. About that time the defendant agreed to finance the enterprise by advancing to the corpo-

ration at least \$300,000.00 for the purpose of enabling it to carry out its contract with the Government. To secure him for such advance, the corporation on January 8, 1918, conveyed to him all the property then owned by it, including the contract with the Government for the sale of spruce, and such as it might thereafter acquire, and appointed him manager and treasurer.

The defendant made advances from time to time as agreed upon, and on June 3, 1918, acquired 51% of the capital stock and was elected one of the Directors and Secretary and Treasurer.

The corporation thereafter continued business, the defendant making further advances from time to time, and during the month of August, 1918, the plaintiff sold and delivered to it spruce logs, for which it subsequently recovered [17] judgment against the corporation for \$15,864.97 and \$22.50 costs, no part of which has been paid except the sum of \$1133.46, leaving due and unpaid the sum of \$14,754.01, with interest at six per cent per annum from August 29, 1919.

By the first of October, 1918, the corporation had become indebted to the defendant in the sum of \$345,000 and was unable to continue its business. It thereupon transferred and conveyed to him its physical properties at an agreed value of \$306,000 which amount was to be credited by him on the indebtedness due him, and it authorized him to obtain a cancellation of its contract with the government for the manufacture of spruce lumber. On the 8th of October such contract was cancelled at

the defendant's request and in lieu thereof a new contract was entered into between him and the Government for the delivery to it by him of 6,200,000 feet within the period ending June 30, 1919, at the rate of 560,000 feet per month. This contract, although properly signed and approved seems never to have been delivered.

November 11, 1918, defendant was notified that the Government would accept no further deliveries of spruce lumber. He thereupon in his own right and as assignee of the corporation filed with the proper Government authorities a claim for reimbursement for damages suffered by reason of such refusal, and in due time his claim was allowed and he was paid the sum of \$60,000.

The question for decision is whether the defendant shall be allowed to retain and apply to his own use the amount received by him from the Government over and above that due him from the corporation, or whether it shall be applied on plaintiff's judgment. [18]

For the defendant the contention is that the payment made to him by the Government was for damages which he alone suffered by reason of the cancellation of the contract of October 8, 1918. But that contract was, in effect, a mere substitution for, or continuation of the former contract with the corporation because he had succeeded to the rights, obligations and property of the corporation, and was conducting the business formerly engaged in by it. It called for deliveries within the period prescribed in the original contract and in the same

quantities monthly. The aggregate amount to be delivered is probably (although there is no evidence on that point) the quantity remaining undelivered by the corporation.

The claim for damages as presented to the Government by the defendant, although made in his own right and as assignee of the corporation, supports this theory. It is based entirely upon the original contract with the Government, the financial transactions of the corporation and its dealings with the government and claims reimbursement on account thereof. The second contract is not mentioned or referred to therein.

The statement submitted in support of the claim is to the same effect, and the principal evidence offered is a report of certified accountants made up from the books and accounts of the corporation. It is upon this theory that the claim was considered and allowed by the Contract Board of the Spruce Production Corporation, which in its findings recites the history of the transactions from the making of the contract with the corporation in December, 1917, to the refusal of the Government to accept further deliveries, and based thereon recommended the allowance. [19]

I conclude, therefore, that plaintiff is entitled to the relief as prayed for and decree may be prepared accordingly. [20]



AND AFTERWARDS, to wit on Wednesday, the 28th day of December, 1921, the same being the 44th judicial day of the Regular November Term of said court—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [21]

**Final Decree.**

This cause came on to be heard at this term and was argued by counsel, and thereupon upon consideration thereof, it was ORDERED, ADJUDGED and DECREED that the above-named plaintiff have and recover of and from the above-named defendant the sum of \$14,754.01, together with interest thereon at the rate of 6% per annum from the 29th day of August, 1919, until paid, together with the costs and disbursements of this suit to be taxed. That execution issue therefor.

R. S. BEAN,  
Judge. [22]

---

AND AFTERWARDS, to wit, on the 21st day of December, 1921, there was duly Filed in said court, a petition for rehearing, in words and figures as follows, to wit: [23]

**Petition for Rehearing.**

The defendant respectfully requests a rehearing, believing that your Honor has erred both in the

law and on the facts in your opinion of December 12th.

First as to the facts: Your Honor has, in effect, decided that all of the \$60,000 awarded by the Spruce Board should go to the Oregon-Pacific Mill and Lumber Company on account of cancellation of contract S. P. D.-4. True, your Honor has allowed Rogers to keep so much of this sum as the corporation admittedly owes him. But this is a mere matter of offset. The full \$60,000 is decreed to be damages for cancellation of S. P. D.-4, and to belong to the corporation; and none of it—not a penny—is decreed to be damages for cancellation of S. P. D.-261 and on that ground to belong to Rogers.

Even if contract S. P. D.-261 be considered, as your Honor chooses to consider it, merely a continuation of contract S. P. D.-4 so that the two contracts cover, in effect, one transaction, how can your Honor say that *all* of the \$60,000 awarded for cancellation should be considered as compensation for the cancellation of the first contract only?

The first contract had proven a losing contract, the officials of the Spruce Division were disgusted with the way Corbaley and MacDonald had conducted things, and the first contract had been cancelled at the request of the *Oregon Pacific Mill and Lumber Company* because *Mr. Dorman, the president, was afraid he or his company might be held liable for damages* to the Government because of their utter failure. [24]

The second contract was, compared to the first, a profitable one, and under the management of Brown, who was installed by Rodgers when he took possession, order was brought out of chaos, things were going ahead more promisingly, and the Spruce Division officers were satisfied.

I call your attention to the statement in the findings of the Settlement Board, paragraph 5. "The board does not recognize the entire claim of Mr. Rogers because of the fact that his mill was operating at a loss while under the direction of Mr. Corbaley and the board cannot consistently recommend consideration of repayment of losses sustained by reason of one individual permitting his affairs to be managed by another individual when the second individual through his own negligence occasions such losses. 'On the other hand, the board recognizes the fact that there *is still an open contract* for the delivery of 4,400,000 feet of airplane spruce lumber *without a cancellation clause attached, and upon which claimant can rest his claim*, especially in view of the fact that during the last couple of months operation of this mill under the new manager, it is evident that *the mill was producing lumber at a profit.*'"

I call your attention to the combined profit and loss account shown on page 3 of the report of Robinson & Bours, certified public accountants, Plaintiff's Exhibit 4, where it appears that the net profit under the first contract from November 28, 1917 to September 30, 1918, *ten months*, was only \$19,691.02, and under the second contract the

net profits were \$8,053.50 from October 1, 1918 to November 30, 1918, *two months*, but in reality only *one month and twelve days*, since operations were shut down November 12th. In the face of this, how can your Honor say that all of the \$60,000 should go to the first contract? [25] On the ratio profits, nearly all of the \$60,000 would go to Rogers. Your Honor will be the first to acknowledge that Courts cannot jump at conclusions but must base their decrees on evidence, and I remonstrate with your Honor that there is absolutely no evidence in the case which would justify your giving all of this money to the Oregon Pacific Mill and Lumber Company and ignoring the rights of the second contract altogether. Thus far I think your Honor on reconsideration will have to agree with me. Of course, I go much further and assert that the whole \$60,000 was awarded on the second contract and belongs to Rogers alone, leaving the Oregon Pacific still owing him between \$30,000 and \$40,000. But if your Honor cannot go that far with me as yet, let me ask this: If you concede that at least some portion of the \$60,000 was due on the second contract, was it not up to the plaintiff in this case to produce evidence by which your Honor could make a fair segregation of the \$60,000 between the two contracts? And has the plaintiff done so? And having failed to do so, can your Honor make any segregation, or must your Honor leave the plaintiff where he stands because he has failed to submit proof?



Your Honor says, in your opinion, after stating your theory that the second contract was merely a continuation of the first, that “the claim for damages as presented to the Government by the defendant, although made in his own right and as assignee of the corporation, supports this theory. *It is based entirely upon the original contract with the Government*, the financial transactions of the corporation and its dealings with the Government and claims reimbursement on account thereof. *The second contract is not mentioned or referred to therein.*”

In this your Honor is mistaken. The claim which [26] you say does not even refer to the second contract commences with this paragraph: “Presented herewith is the claim of Clem W. Rogers in his own right and as assignee of the Oregon-Pacific Mill and Lumber Company for reimbursement for damages suffered by reason of the breach and cancellation by the United States of *its* (the United States) *contract with claimants.*” The words in parentheses are mine, but they are a short way of making the meaning clear. Your Honor may have thought the word “its” referred to the Oregon-Pacific Mill and Lumber Company, but of course that is impossible, as that Company had no “contract with the claimant” which was being cancelled,

At the bottom of page 1 of the claim is the sentence “At this time the Government seeks to *cancel the contract.*” Which, of course, means S. P. D.-261, inasmuch as S. P. D.-4 had already been cancelled. I freely admit that the claim is

based upon both contracts. But I remind your Honor that the claim under both contracts was \$193,891.00, whereas only \$60,000.00 was allowed; which is very consistent with the theory that none was allowed for the first contract because government officials properly took the view that it had been cancelled at the request of the other party, and allowed the full \$60,000 on the second contract alone. If Rogers was not basing his claim at all on the second contract, why would he expressly mention that he was "claiming in his own right"?

In your Honor's opinion, page 3, you say, "But that contract (S. P. D.-261) was, in effect, a mere substitution for, or continuation of the former contract with the corporation because he (Rogers) had succeeded to the rights, obligations and property of the corporation, and was conducting the business formerly engaged in by it." I respectfully point out [27] to your Honor that if Rogers was merely going to continue the business of the corporation, and complete its contract so that the thing could be viewed, as your Honor views it, as all one transaction, an entirely different procedure would have been adopted. The corporation would have *assigned its contract to Rogers*, with the consent of the Spruce Corporation. But it was not a mere continuation and so this was not done. The Spruce officers were sick of the way Corbaley had been going on, Rogers was sick of it, Dorman was afraid of a suit by the government against him or his company, and so all parties decided to cut the thing off short and start afresh, and

that was done. And the government was perfectly right in refusing any award for cancellation of S. P. D.-4—a contract cancelled at the request of the party that later came forward and asked damages for the cancellation.

Consider for a moment the preponderance of the evidence. Mr. Rogers and Mr. Brown both testified that the Spruce Settlement Board absolutely declined to listen to any claim based on the first contract because it had been voluntarily cancelled. This evidence is uncontradicted. It was uncontradicted that they were advised by their counsel that nothing could be recovered on the first contract. In this state of affairs is it conceivable that Rogers would have accepted the \$60,000 with any notion that any *part of it*, let alone *all of it*, should go to the Oregon-Pacific Mill and Lumber Company on the first contract and he should get *nothing*? Let us illustrate a little. Would anyone—any speculator let us say—have come forward and paid \$60,000 for the rights of the Oregon-Pacific Company under contract S. P. D.-4 voluntarily cancelled at its own request? Not if he had been properly advised by counsel. Would anyone, offered his choice as to [28] which contract he would buy for \$60,000 have chosen S. P. D.-4? Again, does it mean nothing that the Oregon-Pacific has never asserted any claim to this money? Dorman, the President, is a man of wealth, well able to enforce his rights. The Oregon-Pacific owes him something over \$8,000. He is a creditor like Brix Brothers. He has never claimed any

part of this money or had the company claim it. Does that imply nothing?

I ask your Honor again to consider the recitals contained in the release prepared by the Spruce Production Corporation which was handed Rogers to sign. The first recital is that whereas Rogers has a contract, "No. S. P. D.-261, superseding contract No. S. P. D.-4 and dated October 8, 1918"; and secondly, whereas, the Government has cancelled "said contract," and thirdly, "whereas, the contractor claims certain damages by reason of *such cancellation*," and fourthly, "whereas, said contract board has allowed said claim in the sum of \$60,000, and the contractor has agreed to accept said award in full settlement and satisfaction of all claims or rights against either the government or said United States Spruce Production corporation arising out of *said contract*." This is the formal instrument of release executed three weeks after the findings of the board and those findings are merged in it. If there is anything in those findings inconsistent with the release, the release is paramount. It is as paramount as the verdict of a jury would be over informal notes and memoranda made in the jury-room showing how the jury reached their verdict. The findings are in no way binding on Rogers. He didn't make them or sign them. His acceptance attached to them is merely that he agrees to accept \$60,000 in full settlement of all claims.

Now the release shows as clearly as possible what contract the \$60,000 is being allowed on, and



absolutely [29] confirms Rogers' and Brown's uncontradicted testimony that the spruce officers refused to allow anything on the first contract. The statement in the release that Rogers releases the Government from all claims and demands growing out of the above mentioned contracts No. S. P. D.-261 and No. S. P. D.-4, or otherwise, etc., is merely the precautionary language of a lawyer who, when securing a release, makes it cover every possible claim he can think of. Since Rogers' claim had included S. P. D.-4, it was quite proper to force him to release as to S. P. D.-4, although nothing had been allowed on it.

I have compared the findings to notes and memoranda made in a jury room because your Honor takes the view that those findings are strong evidence to support your decree. The findings are somewhat ambiguous, and evidently hastily prepared, but there is just as much in them to support the defendant as the plaintiff,—particularly, in paragraph No. 5, the statements that the board does not recognize the entire claim because of the mismanagement of Corbaley under the first contract, but “recognizes the fact there is still an open contract (S. P. D.-261) for the delivery of 4,400,000 feet of airplane spruce lumber *without a cancellation clause attached and upon which claimant can rest his claim.*” This shows that the board regarded the first contract, since it was cancelled, as out of the way, but that the second contract “*without a cancellation clause attached*” deserved consideration.

Coming to the figures in the findings of the Contract Board, they are ambiguous, but there is one item that is very clear and that is that the award was raised from \$48,720 to \$60,000 on the theory that the Government under the contract of August 22, 1918, mentioned in the findings had gone into the claimant's timber and gutted it by selective logging process [30] and left it in a condition where there was no longer there a good logging "show," and that, consequently, the salvage value of \$100,000 mentioned in the computation was too high. Out of consideration for this they increased the award \$11,280. At the least minimum this \$11,280 must belong to Rogers, even under your Honor's theory, because Rogers in his settlement with the Oregon-Pacific Mill and Lumber Company took over the timber at the full purchase price which they had paid for it, less some deductions for taxes. Consequently, if he has reimbursed the Oregon-Pacific Mill and Lumber Company the full original purchase price of the timber, any money paid by the Government for damage to that timber should clearly go to him. Of course, what I have just said must not militate against my contention that the whole \$60,000 clearly belongs to him.

Your Honor evidently pays considerable weight to these findings. Since this case was decided I have talked to Mr. Cameron Squires, who was a member of and recorder of the Contract Board, and he wrote these very findings and signed them. Besides his signature, you will note his initials, "C. S." as the dictator of them. I asked the oppor-

tunity now of producing him as a witness and offer to show by him that the Contract Board was advised by its attorneys that no claims were valid under the first contract because it had been cancelled voluntarily at the request of the other party, and that the Contract Board in awarding the \$60,000 based such award entirely on the second contract, and intended the full sum to go to Rogers in his own right. As a reason for not offering Mr. Squires at the trial, I state that I interviewed him before the trial and he said that so many of these claims had passed before him that his mind was not clear on them after this lapse of time. It [31] was not until after your Honor's decision, when I showed him the findings, contracts and other papers, which findings I had never seen before they were produced at the trial, that Mr. Squires' recollection was sufficiently refreshed to enable him to testify.

But whatever the findings show,—however the \$60,000 was computed, is no concern of Rogers. The *release* is the thing. That was the subsequent document, in which the findings were merged, and it must control.

What is it the Spruce Board wanted from Rogers? A release. A release is what they bought for \$60,000. And if you want to know what the \$60,000 was paid for, and to whom it was rightfully destined, look at the release itself.—“Whereas C. W. Rogers, sole trader doing business under the name of Clatsop County Lumber Company,” etc.,—not assignee of the Oregon-Pacific Mill and Lumber

Company at all—nowhere mentioned as assignee—but only as sole trader. Whereas he has contract S. P. D.-261 *superseding* contract S. P. D-4. S. P. D-4 is out of the way—dead. Whereas he claims damages for cancellation of *said contract*—the only one that is uncanceled—S. P. D.-261. Whereas the board has allowed him \$60,000 in full settlement and satisfaction of *said contract*.

*That* is the release that Rogers sold; *that* is what he parted with for \$60,000. And it was drawn by the Spruce Division itself and approved by their legal department, as you can see from the paper itself. What concern was it of his? Or what concern should it now be of this Court's as to *how* the Contract Settlement Board computed the amount? Or what reasons influenced them? And what right has this Court now to declare to Rogers that he was selling a different release than he actually [32] did? A different release from the one in evidence? How can this Court declare that he signed a release of *his* claims as *sole trader* under his contract but under which release he was to get not a penny?

So much for the facts of the case. Now, for a discussion of the law.

This suit has several aspects. If it be considered a suit on the part of a creditor to recover funds misappropriated by an officer or director of the corporation, then the complaint is defective in two particulars.

In the **first** place, it is the defendant's contention that the Oregon-Pacific Mill and Lumber Com-



pany is and was an indispensable party to the suit and for these reasons:—if any money was misappropriated by Mr. Rogers, that misappropriation was primarily a breach of his duty as an officer and director of the corporation and made him liable to it therefor. In justice to the defendant, when he had raised the objection in his answer, as was done here, the corporation should have been joined as a party defendant, in order that it too might be precluded by the suit instituted by the creditor and the defendant not subjected to the possibility of further litigation upon the same claim. If, moreover, funds of the company were thus misappropriated, then the company very properly might be interested in seeing that the funds, if any, so misappropriated be distributed ratably among all its creditors.

In the case of *Cunningham vs. Pell*, 5 Paige, 607 the plaintiff, a judgment creditor of the corporation, brought suit against its directors alone to recover from them the [33] amount due upon his judgment, on the ground that they had misappropriated funds of the company.

Chancellor Walworth held that the demurrer to the complaint should be sustained, saying at page 613:

“But it is a fatal objection to all the relief claimed by this bill, that the corporation is not made a party. This question was decided in the case of *Robinson vs. Smith*, before referred to. Although that suit was brought by the stockholders, and this by a creditor of

the corporation, the principle is the same in both cases. If this creditor could compel the defendants to account to him for the funds of the bank which have been abstracted by the Pells, the corporation, if in existence, might hereafter compel the defendants to account a second time to it. Although the corporation is located in another state, if it does not appear voluntarily it may be proceeded against as an absent defendant."

In the case of *Chester vs. Halliard*, 36 N. J. E. 313, a suit was brought by various depositors of a savings bank against certain of its managers on behalf of themselves and such other depositors as might choose to join with them in the litigation seeking to recover the amount of their several deposits from the managers of the institution on two grounds, namely, fraud in misrepresentation as to the condition of the bank, which is not here pertinent, and secondly because the funds of the bank had been squandered by the defendants.

A demurrer to the bill having been interposed, the Court of Errors and Appeals, affirming the trial court's decision sustaining the demurrer on this ground, said at page 315:

"The second ground of complaint stated in the bill is deficient not in form, but in substance. It consists in statements showing that the defendants, as directors of the funds [34] of the bank so mismanaged its affairs that it became insolvent. The bank itself is not a party to the suit, and the consequence is the

complainants have no standing in court on this part of their case. If the capital and assets of the corporation have been squandered and lost by the misconduct of its officers, it is the corporate body itself that primarily has been wronged, and reparation is due immediately to it and not to the dispositors. The depositors are but creditors of the corporation, and the moneys in question are not their moneys. It is true that as the directors are alleged to be the delinquent parties who are sought to be charged with the liability to make good the losses in question, these depositors have a footing in court to such redress in this matter, but in such proceedings the corporation, or in case of its insolvency, its receiver, must be a party, for it is in right of such corporate body that such a course of law is alone to be vindicated. But I shall not further discuss this subject, for the decisions are uniformly opposed to the legal power of a member of the corporate body to bring a suit in his own right and in disconnection with the company, for losses occasioned to the corporation by the misconduct of its officers, and the topic has so recently undergone examination by the Supreme Court in the case of *Conley vs. Halsey*, 15 Vr. 111, decided at the last term of that court. This suit cannot be sustained against these defendants on this second ground, the same being thus essentially defective."

In Cook on Corporations (4th Edition), Section 738, in speaking of similar suits brought by stockholders, it is said:

“The corporation itself is an indispensable party defendant [35] to a stockholder’s action for the purpose of remedying a wrong which the corporation itself should have remedied. This rule is due to the fact that a similar possible suit by the corporation is thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others.”

See also:

Porter vs. Sabin, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110.

Lathrop, Shea & Henwood Company vs. Byrne, 100 N. Y. S. 104.

Robinson vs. Smith, 3 Paige, 222, 233.

Davenport vs. Dows, 18 Wallace, 626, 627.

Boyd vs. Mutual Fire Association (Wisconsin, 1903), 94 N. W. 171, 172.

In the second place the complaint is defective in that it fails to allege, and the evidence is insufficient in that it fails to show, any demand made by the plaintiff before the institution of this suit that it sue to recover the sums converted, or to show any excuse for not so doing. The wrong is primarily to the corporation and any action brought by either a stockholder of a solvent corporation or by a creditor of an insolvent corporation is in the right of the corporation, whereas in this state the



officers and directors of the corporation are not trustees for creditors and the trust fund theory so called is not adopted.

“Neither the corporation nor its governing body, so long as it is a going concern, holds its property in trust for creditors. The officers or directors occupy [36] a fiduciary relation, demanding care, vigilance, and good faith. If they violate their duty, they at once become responsible to the corporation. If they are guilty of misfeasance or malfeasance, the latter may at once bring an action at law to enforce such liability. If the corporation refuses to act, the stockholders before insolvency, and the creditors after insolvency, may enforce such liability in the right of the corporation, and not otherwise. Such right is not based entirely upon the relation of trusteeship sustained to the creditors, but rather upon the legal right of the corporation to compel them to make reparation for their wrong. The right of the creditor to enforce the rights of the corporation may be said to rest upon the so-called fiduciary relation which the officers sustain to the corporation and indirectly to them.”

Boyd vs. Mutual Fire Association (Wisconsin, 1903) 94 N. W. 171, 172.

“Generally, where there has been a waste or misapplication of the corporate funds, by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the

corporation. But as this Court never permits a wrong to go unredressed merely for the sake of form, if it appears that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant."

Robinson vs. Smith, 3 Paige, 222, 233.

Porter vs. Sabin, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110. [37]

Suits brought by creditors directly against officers of a corporation to recover funds of the corporation alleged to have been misappropriated by the defendant officer are rare. They are, however, analogous to such suits by stockholders.

"Creditors cannot themselves ordinarily maintain actions at law against the directors or other officers of a corporation to recover damages for conversion of its assets or loss by reason of misapplication thereof, or of negligence, since the injury is to the corporation. Generally, it is held that the proper mode of enforcing the liability, if the creditor has the right to sue, is by suit in equity on behalf of the creditors and to which the corporation itself is a party."

Fletcher on Corporations, Section 2673.

“Actions by creditors against corporate officers for wrongs primarily to the corporation itself are not common, except where the right to sue is created by statutes and the common law liability of officers to the corporation or its stockholders cannot generally be enforced by creditors, nor can the creditors sue as an individual under ordinary circumstances. Oftentimes, however, a statute creates a liability in favor of the creditors.”

Fletcher on Corporations, Section 2678.

If this suit be considered not one to recover from the defendant funds which he as an officer of the corporation has misappropriated, but rather a suit to set aside a fraudulent conveyance, that is to set aside the assignment of the claim of the corporation against the United States Spruce Production Corporation, the making of which is both [38] alleged by the complaint and admitted by the answer, then the Oregon Pacific Mill and Lumber Company is still an indispensable party and it was incumbent upon the plaintiff to join the corporation as a party defendant when the defect in parties was specifically raised in the answer and also by objection at the outset of the trial.

In *Gaylords vs. Kelshaw*, 1 Wallace, 81, the plaintiffs as judgment creditors of the defendant Kelshaw brought a suit in the Federal Circuit Court to set aside an alleged fraudulent conveyance of land from Kelshaw to Butterworth.

The plaintiffs were alleged to be citizens of Ohio, while defendant Butterworth was alleged to be a

citizen of Indiana. The complaint was silent as to the citizenship of the defendant Kelshaw.

In the absence of a showing on the face of the bill or in the record of the citizenship of the defendant Kelshaw, the question of the Federal Court's jurisdiction was discussed by the Supreme Court. The Court said:

“It is clear, that neither the Court below, nor this Court, has jurisdiction of the case as between plaintiffs and Kelshaw.”

But as the Court might, under some circumstances, proceed to adjudicate on the rights of the parties properly before it, we must look into the case, so far as to see if it is one in which relief may be decreed, as between plaintiffs and Butterworth, without regard to Kelshaw.

“Without referring to the numerous cases in this court and others, on the necessity of having all the proper parties before the Court, in a suit in equity, and the circumstances under which the court will proceed in some cases, without [39] persons who might well be made parties, it is sufficient to say that, in the present case, we think Kelshaw is properly made a defendant to this suit. It is a debt which he owes which is sought to be collected. It is his insolvency which is to be established, and it is his fraudulent conduct that requires investigation.

“If the conveyance to Butterworth shall be decreed to be set aside, and the property conveyed to him, subjected to the payment of



plaintiffs' debt, it is proper that Kelshaw should be bound by the decree; and to that end he ought to be a party."

In *Swan Land & Cattle Co. vs. Frank*, 148 U. S. 603, 13 Sup. Ct. Rep. 691, 694, in speaking of the case of *Gaylords vs. Kelshaw*, *supra*, it was said that in that case

"It was held by this Court that in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant, because it was his debts that were sought to be collected, and his fraudulent conduct that required investigation."

See also:

*Bank of Commerce vs. McArthur*, 248 Fed. 138, 141.

*Beswick vs. Dorris*, 174 Fed. 502, 508.

Your Honor's decision compels the writer to feel that he must have been at fault in his presentation of the case, and, in view of the matters now called to your Honor's attention in this petition, we respectfully ask a rehearing. [40]

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AND AFTERWARDS, to wit, on Monday, the 16th day of January, 1922, the same being the 60th judicial day of the regular November Term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [41]

**Order Denying Petition for Rehearing.**

This cause was submitted to the Court upon a petition of the defendant for a rehearing herein, upon consideration whereof,

IT IS ORDERED that said petition be and the same is hereby denied. [42]

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AND AFTERWARDS, to wit, on the 27th day of June, 1922, there was duly filed in said court a petition for appeal in words and figures as follows, to wit: [43]

**Petition for Appeal and Order Allowing Same.**

To the Honorable CHARLES E. WOLVERTON and the Honorable R. S. BEAN, Judge of the Above-entitled Court:

The above-named defendant, feeling himself aggrieved by the decree made and entered in this cause in the above-entitled court on the 28th day of December, A. D. 1921, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that the transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

Your petitioner further prays that the proper order touching the security required of him to perfect his appeal be made.

WOOD, MONTAGUE & MATTHIESSEN,

Attorneys for the Defendant, Clem Rogers.

The foregoing appeal allowed upon giving bond as required by law for the sum of \$500.00.

Dated June 27, 1922.

R. S. BEAN,  
District Judge. [44]

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AND AFTERWARDS, to wit, on the 27th day of June, 1922, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [45]

**Assignment of Errors.**

Comes now the defendant in the above-entitled cause and files the following assignment of errors, upon which he will rely upon his prosecution of the appeal in the above-entitled cause from the decree made and entered in the District Court of the United States for the District of Oregon, on the 28th day of December, 1921:

1. The Court erred in failing to hold that Oregon Pacific Mill and Lumber Company was a necessary party defendant in the above-entitled suit.

2. The Court erred in proceeding to the trial of this cause over the objection of this defendant without joining the Oregon Pacific Mill and Lumber Company as a party therein.

3. The Court erred in entering a decree herein in favor of the plaintiff for the reason that the complaint fails to state facts sufficient to constitute a cause of suit by plaintiff against this defendant.

4. The Court erred in entering a decree herein in favor of the plaintiff against the defendant for the reason that the evidence is insufficient to support same.

5. The Court erred in failing to enter a decree herein in favor of the defendant and against the plaintiff.

6. The Court erred in holding that the complaint stated facts sufficient to constitute a cause of suit on behalf of the plaintiff as a judgment creditor of Oregon Pacific Mill and Lumber Company against this defendant because:

(1) There is no allegation that plaintiff requested the Oregon Pacific Mill and Lumber Company, or any of its officers or agents, to institute action or suit against this defendant, nor any allegation of facts excusing such demand. [46]

(2) The suit is brought on behalf of one creditor only and not on behalf of all creditors similarly situated.

(3) It is not alleged that the company was insolvent or, if insolvent, that the defendant had notice or knowledge thereof when the \$60,000 was received by him from the United States Spruce Production Corporation.

7. The Court erred in entering a decree herein in favor of the plaintiff against the defendant because:



(1) There is no evidence to show a demand upon the Oregon Pacific Mill & Lumber Company by plaintiff to institute any action or suit against this defendant, nor any facts excusing such demand.

(2) There is no evidence to indicate that the suit is brought in a representative capacity or otherwise than for plaintiff's sole interest.

(3) There is no evidence that the Oregon Pacific Mill & Lumber Company was insolvent or that the defendant had notice or knowledge of it insolvency when he received the funds from the United States Spruce Production Corporation.

8. The Court erred in deciding that any portion of the \$60,000.00 received by Rogers from the United States Spruce Production Corporation was the property of Oregon Pacific Mill & Lumber Company.

Dated June 26, 1922. [47]

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AND AFTERWARDS, to wit, on the 27th day of June, 1922, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit: [48]

#### **Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Clem Rogers, as principal, and American Surety Company, a New York corporation authorized and qualified to do a general surety business within the State of Oregon and elsewhere, as surety, are held and firmly bound unto Brix Bros.

Logging Co., a corporation, the complainant in the above-entitled suit, in the sum of Five hundred dollars (\$500.00), lawful money of the United States, to be paid to it, its successors and assigns; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our heirs, successors and personal representatives, by these presents.

Sealed with our seals and dated this 19th day of June, 1922.

The condition of this obligation is such that

WHEREAS, the above-named Clem Rogers is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree made and entered in the above-entitled cause in the District Court of the United States for the District of Oregon;

NOW, THEREFORE, if the above-named Clem Rogers shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CLEM W. ROGERS, [Seal]

Principal.

[Seal]

AMERICAN SURETY COMPANY OF  
NEW YORK,

By W. J. LYONS,

Resident Vice-President.

Attest: W. A. KING,

Resident Assistant Secretary.

W. J. LYONS,

Agent.

The within bond is approved both as to sufficiency and form this 27th day of June, 1922.

R. S. BEAN,  
District Judge. [49]

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AND AFTERWARDS, to wit, on the 25th day of July, 1922, there was duly filed in said court a statement of the evidence, which with the exhibits therein designated to be included are in words and figures as follows, to wit: [50]

#### **Statement of the Evidence.**

Defendant before the case proceeded to trial, objected to the Court's proceeding with the case at all on the ground that the bill of complaint is a bill to set aside as fraudulent the transfer of the property of the Oregon Pacific Mill & Lumber Company to defendant Rogers, the bill alleging that these transfers were made to him for the purpose of cheating and defrauding creditors of the Oregon Pacific Mill & Lumber Company, of which he was a treasurer, and the prayer of the bill being that this transfer be set aside and that Rogers be compelled to account for all moneys that he received, and that a decree be entered against him personally compelling him to pay this complainant on the ground that Rogers holds money of the Oregon Pacific Mill & Lumber Company which does not belong to him because the transfers to him were fraudulent; and defendant objected that the bill being framed as it was, the Oregon Pacific

Mill & Lumber Company was a necessary party defendant. The court overruled the objection.

### **Testimony of Max Church, for Plaintiff.**

MAX CHURCH, a witness for the plaintiff, testified in substance that he was an attorney by profession, living in Portland, and was a secretary of the United States Spruce Production Corporation, and that he was a recorder and a member of the Claims Board of the United States Spruce Production Corporation, and that he had been secretary of the corporation for about eighteen months and a member of the Claims Board for about a year. He produced and identified Plaintiff's Exhibit 2, which he said was filed with the Claims Board during the month of December, 1918. Said Plaintiff's Exhibit 2 is as follows:

#### **Plaintiff's Exhibit No. 2.**

“To the United States Spruce Production Department:

Presented herewith is the claim of Clem W. Rogers [51] in his own right and as assignee of the rights of the Oregon Pacific Mill & Lumber Co., for reimbursement for damages suffered by reason of the breach and cancellation by the United States of its contract with claimant.

The claim in this form is presented at the request of the United States Spruce Production Corporation as a basis of settlement, and the claimant reserves all legal rights.

In the nature of things the claim will have to be modified either in favor of or against the claimant



by reason of facts and figures which are not at this time at the disposal of the claimant.

In this petition it is proposed only to outline briefly and concisely the facts upon which it is based.

Upon representation of Government officials as to the great need by the Government for an immediate supply of airplane spruce, and based upon an order for a large quantity thereof, the claimant and his predecessors in interest caused to be organized the Oregon-Pacific Mill & Lumber Co., and the corporation secured in compliance with the order referred to a certain contract covering a period of eighteen months for the delivery of a large amount of said airplane spruce, according to certain specifications and at a price and under conditions named in the contract. For the sole and only purpose of manufacturing and delivering the said airplane spruce called for by said contract, and based upon the terms and conditions thereof, the claimant or his predecessors in interest purchased a large amount of timber, a mill and mill-site.

If in fact the government had permitted the Oregon-Pacific Mill & Lumber Company and the claimant to operate for the full eighteen months under the contract as originally [52] drawn it would have been enabled to amortize its investment and show a profit of  $18\frac{1}{2}\%$  on the gross business done within the period under the contract.

In fact, however, the Government saw fit to change the conditions surrounding the contract,

but failed to make the equivalent change in the price as required by the contract. At this time the Government seeks to cancel the contract.

Inasmuch as the claimant and his predecessors in interest entered in to this contract for the sole purpose of furnishing airplane spruce to the Government it is willing that said contract should be cancelled. The claimant does not ask the United States Government for any profit that he is able to show would have been made under the original contract, nor does he ask for any loss that he or his predecessors in interest may have suffered by reason of the change in condition ordered by the Government. The claimant does ask at this time to be made whole for the actual investment made for the sole and only purpose of furnishing to the Government spruce which it urgently needed, and to supply it was the sole reason of the investment made.

In arriving at the amount of the claim full credit has been given the Government for salvage in the way of timber, lumber, mill equipment, property, etc. remaining in the hands of the claimant.

Respectfully submitted,

(Signed) CLEM. W. ROGERS.

## CLAIM OF CLEM W. ROGERS.

## Debits.

Money advanced on con-

tract .....\$345,000.00

Accounts payable ..... 40,584.42      385,584.42

## Credits.

Salvage value of Invest-

ment ..... 100,000.00

Accounts receivable .. 59,693.21

Lumber on hand (est.).. 32,000.00      \$191,693.21

NET LOSS .....\$193,891.21''

[53]

The witness next produced and identified Plaintiff's Exhibit 3, which he said was filed with the Claims Board subsequent to Plaintiff's Exhibit 2, and which is as follows:

**Plaintiff's Exhibit No. 3.**

To the Contract Board of the United States Spruce Division.

Gentlemen:

In support of the claim, already filed with your Honorable Board, of Clem W. Rogers in his own right and as assignee of the Oregon-Pacific Mill & Lumber Company, I present herewith the following:

1. Certified Public Accountant's Report of Financial Transactions and Operations of Claimants' business.

2. Copy of Federal Trade Commission Order for making out Monthly Reports of the Industry.

3. Copy of U. S. Spruce Division Auditor's Estimate of operations of claimants mill,  
—to all of which references are made in this Statement.

Permit me to review the facts as placed before you as to this particular claim:—

ORIGIN:

In November, 1917, Charles W. Corbaley, one of the organizers of this Company, received the following letter:

WAR DEPARTMENT.  
OFFICE OF THE CHIEF SIGNAL OFFICER.  
WASHINGTON.

Nov. 13, 1917.

From: Major Chas. R. Sligh,

To: Mr. Chas. W. Corbaley,

Palace Hotel,

San Francisco, California.

SUBJECT: Spruce Tract.

1. In confirmation of our conversation regarding the seventy million feet of spruce upon which you have an option, would state that this Division will contract with you for your entire [76] product of aircraft spruce in accordance with our specifications No. 1 at a price of \$105.00 per thousand feet, f. o. b. Mill.

2. If, for any reason, a modification of these specifications is made, you will have the option of taking advantage of such modification if you so desire.



3. We will enter into a contract with you extending over a period of eighteen months for the sawing and delivering of this lumber.

4. We would also give you a contract for delivery within the next four or five months for a certain quantity of aircraft fir, the exact quantity we cannot state, but this office at this time has requisitions for a larger amount than they can supply immediately.

5. In accordance with an Act passed by the last Congress, the Government is authorized to make advances up to 30 per cent of the amount of the contract, provided that satisfactory security is furnished for these advances: these advancements to apply on the purchase price.

6. Colonel B. P. Disque, or Captain Russell Hawkins, Representative of the Signal Corps, Yeon Building, Portland, Oregon, have authority to make contracts in accordance with the above.

By direction of the Acting Chief Signal Officer.

(Signed) CHAS. R. SLIGH,

Major, Signal Corps.

#### CONTRACT:

Based thereon, the Oregon-Pacific Mill & Lumber Company was incorporated in December, 1917, and at once proceeded to acquire spruce and fir timber at war appreciated prices in Clatsop County, Oregon, for the sole purpose of cutting spruce [77] for the U. S. Spruce Production Division, and, on December 22, 1917, executed the Contract, known as No. SPD-#4. The Contract was to run from December 1917 to July 1919, and

was for ten million feet of spruce at \$105.00, and included the following articles:

“Art. VII. The Government hereby reserves the right to any time during the period covered by this contract to change, alter, and amend the Standard Specifications No. 1 attached to this agreement in such particulars as it may deem advisable, provided, however, that if any change or changes in grade or specifications hereto attached are made by the Government, it is agreed that a corresponding change shall be made in the price. The Seller agrees that it will comply with all the terms of such specification as changed, altered or amended by the Government.”

“Art. VIII. It is further understood, contracted and agreed that in view of the situation attempted to be met by this and similar contracts and the emergency now existing calling for the delivery of a large amount of spruce to satisfy the Government's needs, that the Seller will, from and after the signing of this Contract, run and operate its mill to its fullest capacity, running night and day shifts, if possible, and necessary, and that he will, during the period covered by this contract buy all logs suitable for construction in airplanes offered by any logger or producer without discrimination on account of the individual or for any cause and will pay therefor the full price as set and determined by the Government, the quantity and quality to be governed by the grading rules established by the Government.”

“Art. VII. provides that in event of any change made by the Government, a corresponding change will be made in [78] price, and Article VIII. provides for buying airplane logs offered by any logger at full Government price, in accordance with Government grading rules.”

To acquire said timber and the mill to fulfill the Government's Contract as per Specifications, required a total investment of \$320,787.63, as shown by attached accountant's report.

The claimant undertook this work solely as a war measure for the benefit of the Government; having no wish or desire to enter the Commercial Lumber business; and would not have undertaken it except to help the Government output of spruce for aeroplanes. Hence, no effort was made (as it carried out only Government Contracts) to create a general sales organization for future activity on commercial lines. The “side-cut” was being disposed of at intervals, but was considered simply as such, and no effort was made to perpetuate the organization after the war. It was figured that operation for the Government for the 18 months contracted for would, at then existing prices and conditions, fairly reimburse the claimant investors and perhaps bear a small per cent of profit at the end.

#### OPERATIONS:

The claimant at once proceeded to operate and was buying spruce logs in Astoria (where the Mill is situated) at average price of \$22.50 per M, with the idea of doing so until it could get railroad

facilities into its timber and then to log and use its own logs. The price of \$22.50 was fixed by the Government authorities as follows: #1-\$35.00, #2-\$20.00, #3-\$11.00 per M. plus water haul.

When commencing in January, 1918, the labor situation was that men were working ten hours shift, and at current wages claimant's cut showed gain of \$7.25 per M. But, as of [79] March 1, 1918, the authorities changed pay rates and hours increasing pay and reducing time to eight hours, which made a difference in labor cost of \$1.60 per M or about 25%. Further, on or about April 1, 1918, the Government ordered claimant to cut Cants instead of airplane stock, at price of \$100.00 per M. During April, this was done and all cants so cut were billed to the Government at \$100.00 per M; but later the Government paid at the rate of only \$7,500 for that lot, demanding and receiving credit for the difference.

Thereafter, as of May 1st, 1918, the Government set the following prices on Spruce Cants: #1-\$90.00, #2-50.00, #3-\$30.00. This made differences as follows between the original Contract basis, and the changes ordered.



|                                      |         |
|--------------------------------------|---------|
| A—ORIGINAL BASIS SALES: (10 hours    |         |
| day) .....                           | \$41.77 |
| 12% at \$105.00, 29% at \$65.00      |         |
| and 59% at \$17.50.                  |         |
| COSTS: .....                         | 34.52   |
| Logs (at Government prices) .        | .22.50  |
| Milling (as per Government           |         |
| Auditor) .....                       | 12.02   |
| <hr/>                                |         |
| Gain per M .....                     | 7.25    |
| B—SALES PER M. (after Changes Or-    |         |
| dered) .....                         | 33.60   |
| Cants #1 & #2—28% at \$75.00         |         |
| Box and Better—72% at \$17.50        |         |
| Very few #3 Cants taken by Gov-      |         |
| ernment .....                        |         |
| Costs per M (as above) .....         | 34.52   |
| <hr/>                                |         |
|                                      | .92     |
| Additional Cost of Labor, as above   | 1.60    |
| <hr/>                                |         |
| Net loss to mill per M (8 hours day) | 2.52    |
| <hr/>                                |         |

When, after operating a short time under Specification No. 1, the Government required the Oregon-Pacific Mill & Lumber Company to cut cants instead, also increasing labor cost [80] 25 per cent by reduction of hours and new wage scale, the Government did not make a corresponding increase in price as provided for in the contract. Buying logs as provided in Art. VIII. at Govern-

ment price and scale, a mill must operate at a loss under these conditions. About April 1, 1918, the Government also ordered discontinuance of sale of "G List," for which they were paying the claimants \$65.00 per M. This reduced the company's activities to cutting spruce cants for the United States and selling side-cut as box lumber.

Late in the summer, the Government put an embargo on eastern shipments, by which claimants were further handicapped in realizing on "side-cut," as most of its sales other than to the Government were to far Eastern points. This left the claimants with over three million feet of spruce on hand when operations were ordered stopped. There was and is, no demand to speak of for this lumber except in the East.

#### TIMBER:

In accordance with the agreement contained in the letter quoted herein from Major Chas. R. Sligh on behalf of the Acting Chief Signal Officers, dated November 13, 1917, the claimants purchased properties in Clatsop County Oregon, to carry on its contract with the Government (which contract provided for cutting 60% spruce and 40% fir) consisting of: 16 million feet spruce, 10 million feet fir, 16 million feet hemlock, and an idle mill in Astoria, upon which a considerable amount of money was expended to put same in working condition.

Claimants were prepared to cut and saw their own logs and had they been allowed to do so, they

would have amortized their purchase price as follows:

Cost of logging and hauling to the river (as per estimates received before purchasing property) \$9.00 per M. [81] The average cost of spruce logs purchased at Government prices was \$24.00 per M. (See Government Auditor's Report.) The average cost of fir logs at prices fixed by the Government was \$15.00 per M.

16 million feet of spruce at \$24.00.....\$384,000.00

10 million feet of fir at 15.00..... 150,000.00

---

\$534,000.00

Less cost of logging at \$9.00..... 234,000.00

---

\$300,000.00

Stumpage value of 16 million feet of

hemlock

16,000.00

---

\$316,000.00

The above statement will show that the receipt on the timber of \$316,000 would amortize the purchase price of \$275,000 and paid for the improvements and repairs necessary to put the mill in working order, which approximates \$45,000, making a total investment of some \$320,000.

The claimants received the following letter from the War Department of the Spruce Production Division, Bureau of Aircraft Production, in which the Government commandeered all their timber, making it impossible for claimant to recover purchase price of property.

Portland, Oregon, Yeon Building,

August 22, 1918.

From: Manager of Government Operations.

To: Oregon Pacific Mill & Lumber Co.,

Astoria, Oregon.

SUBJECT: Selective Logging Contract.

1. The Government is about to enter upon the NW  $\frac{1}{4}$  of Section 21-6-9; the W  $\frac{1}{2}$  of the NE  $\frac{1}{4}$ , S  $\frac{1}{2}$  of the NW  $\frac{1}{4}$ , SW  $\frac{1}{4}$ , and NW  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 23-6-9; and the SE  $\frac{1}{4}$  of Section 22-6-9, Clatsop County, and would like to know if you intend to sign the Contract submitted by the Grant Smith-Porter Bros. Company covering this timber. If you do not do so, we will have to commandeer the same immediately. In case we are forced to do this, you will have to prove your value in court and also will undoubtedly be delayed for a considerable length of time before you will be reimbursed [82] for your timber.

2. We wish to urge upon you the signing of this contract, in that the Government needs spruce and we must take yours, and would much rather do so with your permission than by forcing the issue.

By direction of Colonel Disque:

REUBIN HITCHCOCK,

RH: H.

Major A. S. P."

Some mills made money on account of having their own logs, but mills buying logs should not be penalized on account of this fact.

The cost of operation in nearly all the mills is approximately the same, and the average selling price of manufacturing lumber is about the same,



so that the profit or loss to mills in different localities is due only to difference in price and grade of logs. That is a mill securing logs below the Government price can make money, while a mill following the terms of the contract and paying Government prices can lose money.

#### CANCELLATION:

On November 11, 1918, notice was given by the Government of Cancellation of *all* Contracts, and instructions to file claims. Thereupon, claimant filed his claim with your Board, and claims herewith that a continuation of activity for the Government would have enabled claimants as already stated, to reimburse themselves for the outlays of borrowed and invested capital as exhibited.

#### FUTURE:

The Mill is adaptable, in its present state, to Government activity only, and would require further investment of at least One Hundred Thousand (\$100,000.00) Dollars for Box Factory, Planing Mill and other additions and changes, to make it useful as a commercial venture. It had been idle for over a [83] year prior to claimants' purchase, owing to its box factory, planing mill, kilns and other necessary parts being destroyed by fire in 1916.

#### TAXES AND DEPRECIATION:

It is to be noted that attached certified report showing investment and values, does not include as an entry, any taxes or depreciation.

Based on attached copy of Government Spruce

Division Auditor's Comments claimant respectfully refers therein to page 2, paragraph 3.

#### TAXES:

"1917 figures were not considered equitable for this operation as mill was idle during this period. Taxes were estimated at \$12,000.00, which, on the basis of a cut for the year of 24,000,000" (also estimated), amounts to 50¢ per M. In explanation of the apparently high estimate for taxes, it might be well to call attention to the fact that this mill is located in a city and consequently will have items of street improvement, sewer and other assessments which an outside mill would not have to consider.

#### DEPRECIATION:

This is referred to in attached Federal Trade Commission instructions, Page 7, Line 37, which is as follows:

"This account shall include such charges, based upon the plant investment and life of the standing timber as will at the date of timber exhaustion constitute a fund that will equal such investment, less scrap value. The present life of the timber operation shall *not* be taken as the remaining life, but must date from the purchase of the timber by the present company. Depreciation on stores, dwellings and non-lumber manufacturing property must be excluded from this account. For example: The plant cost \$400,000 and the estimated salvage value at the [84] end of the life of the property is \$50,000. The net loss in plant would be \$350,000. If the original stumpage holdings amounted to

350,000,000 feet log scale, said footage divided into the plant loss would show a depreciation of extinguishment of \$1.00 per M. feet log scale as stumpage was cut."

"Depreciation of sawmilling equipment on account of wear and tear is found by deducting from the original cost of the equipment its residual or scrap value, and dividing this difference obtained by the estimated life of the equipment. A percentage method can be used which when applied to the net book value of the machine will leave only the scrap value of the machine on the books at the expiration of its estimated life."

It is to be noted that claimant, in claim filed has allowed as at present "Scrap value," One Hundred Thousand (\$100,000.00) Dollars, which is far greater than would have been figured on basis of said Federal Trade Commission instructions—which shows there is no desire on part of claimants to request more than a very just allowance thereon.

It is also to be noted on Page 1 of said Government Auditor's memorandum—"cost of Logs . . . . \$24.00," whereas claimant has calculated same herein at \$22.50, being 1.50 difference per M.

Reference is also hereby made to General Explanation on Page 3 of said memorandum report—particularly to last paragraph regarding handling and disposition of side-cut.

Claimants respectfully submit:

1. That they entered into said Contract herein referred to at the instigation of the Government.
2. That, in addition to the original investment

of \$278,000.00, they expended approximately \$60,000.00 in building [85] barracks, cook-house, and repair work of all kind in order to carry out the terms of said Contract.

3. That they purchased said property and made said improvements only after they had accepted said Contract.

4. That the various changes in prices and labor conditions made at request of Government made it impossible for claimants to operate its property at a profit sufficient to take care of the heavy depreciation and taxes.

5. That the timber lands were acquired at war prices for the purpose of executing the Government Contract, but were commandeered by the Government without adequate compensation.

6. That the claimant is at present losing approximately \$2,000.00 per month, cost of insurance, watchman, taxes, interest, etc., on the mill, which is idle.

Claimants are not at this time asking for the profit which they feel they are undoubtedly entitled to, they are not even asking for a reasonable rate of interest on their investment or the loss incurred through the cancellation of the Contract, but they feel that they are legally, morally and *equitable* entitled to be reimbursed in the amount of said claim.

Respectfully yours,

(Signed) CLEM W. ROGERS. [86]

The witness next produced and identified Plaintiff's Exhibit 4, which is as follows:



**Plaintiff's Exhibit No. 4.**

A. Porter Robinson

B. W. Bours

ROBINSON and BOURS,  
Certified Public Accountants,  
Merchants National Bank Building.

#44-46

San Francisco, Cal., December 24, 1918.

C. W. Rogers, Esq.,

San Francisco, California.

Dear Sir:

Acting under your instructions, we have made an investigation of the books and records of the Oregon Pacific Mill & Lumber Company, a Nevada Corporation, and the Clatsop County Lumber Company, who acquired certain of its properties, from the organization of the Oregon Pacific Mill & Lumber Company as at November 28, 1917, to November 30, 1918. For the purposes of greater clarity we have included, however, certain transactions which actually occurred in the month of December, 1918.

It is understood that we have made no audit of these accounts, and that our attention has been directed solely toward the preparation of Statements, which, eliminating the changes in ownership and management, would show the dealings with these Properties since their original acquirement from the Clatsop Mill Company, the subsequent operations, and the status thereof as at November 30, 1918.

We now beg to present our Report as follows, which, subject to the explanations in the General Report hereinafter, we certify to have been correctly prepared from the books and records:

COMBINED STATEMENT OF ASSETS & LIABILITIES, Nov. 30, 1918.

COMBINED PROFIT & LOSS ACCOUNT, Nov. 28, 1917, to Nov. 30, 1918.

ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES, COMBINED NET CAPITAL INCOME & EXPENDITURE ACCOUNT, Nov. 28, 1917, to Nov. 30, 1918.

We remain, Dear Sir,

Faithfully yours,

ROBINSON and BOURS,

Certified Public Accountants.

This report consists of 12 pages, each one initialed APR. [87]

OREGON PACIFIC MILL & LUMBER COMPANY, A CORPORATION.  
CLATSOP COUNTY LUMBER COMPANY,  
COMBINED STATEMENT OF ASSETS & LIABILITIES—November 30, 1918.

ASSETS.

CURRENT ASSETS:

Cash

\$110,391.55

Accounts receivable

Schedule #1 6,493.54

Notes receivable

" 2 67,283.01

Lumber Stock

" 3 2,004.05

Bonds

" 4 34,110.95

PLANT & PROPERTIES

" 5 500.00

INSURANCE UNEXPIRED

320,387.63

2,283.66—433,062.84

LIABILITIES.

CURRENT LIABILITIES:

Accounts Payable  
Estimated Freight  
Taxes Payable

CLEM W. ROGERS

CAPITAL INVESTED

PROFIT & LOSS

65,318.32

Schedule #7 31,090.97

" 8 25,539.50

" 9 8,687.85

315,000.00

25,000.00

27,744.62—433,062.84

APR. [88]



COMBINED PROFIT & LOSS ACCOUNT.  
NOVEMBER 28, 1917, TO NOVEMBER 30, 1918.

Without Consideration of Accrued Taxes or

Depreciation.

|                           | Oregon Pacific Mill<br>& Lumber Co.<br>Nov. 28, 1917,<br>to<br>Sept. 30, 1918.<br>\$430,631.78 | Clatsop County<br>Lumber Company<br>Oct. 1, 1918<br>to<br>Nov. 30, 1918.<br>87,761.93 | Total      |
|---------------------------|--|---|------------|
| NET SALES                 |  |   | 518,393.71 |
| COST OF SALES:            |  |   |            |
| Log Supply                | 293,331.56   | 38,370.01   | 331,701.57 |
| Water Haul & Pond Expense | 8,908.94   | 832.43  | 9,741.37   |
| Saw Mill Expense          | 48,608.43  | 13,565.63   | 62,174.06  |
| Yard Expense              | 45,384.07  | 7,537.01  | 52,921.08  |
| Cook house                | 2,684.66   | 952.26  | 3,636.92   |
| Office & General Expense  | 27,641.95  | 3,561.64  | 31,203.59  |
| Insurance                 | 18,797.29  | 2,241.25  | 21,038.54  |
| Total                     | 445,356.90   | 67,060.23   | 512,417.13 |

|                             | Oregon Pacific Mill<br>& Lumber Co.<br>Nov. 28, 1917,<br>to<br>Sept. 30, 1918. | Clatsop County<br>Lumber Company<br>Oct. 1, 1918<br>to<br>Nov. 30, 1918. | Total      |
|-----------------------------|--|--|------------|
| Lumber Inventory Adjustment | 46,759.15  | 12,648.20  | 34,110.95  |
| Cost of Sales               | 398,597.75   | 79,708.43  | 478,306.18 |
| OPERATING PROFIT            | 32,034.03  | 8,053.50   | 40,087.53  |
| SUNDRY EARNINGS             | 1,549.92   |  | 1,549.92   |
| TOTAL PROFIT                | 33,583.95  | 8,053.50   | 41,637.45  |
| INTEREST PAID               | 13,892.93  |  | 13,892.93  |
| NET PROFIT                  | \$ 19,691.02   | 8,053.50   | 27,744.52  |
| APR. [89]                   |  |  |            |

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

## Schedule #1.

|                                      |              |             |
|--------------------------------------|--------------|-------------|
| CASH.                                |              | \$ 6,493.54 |
| Oregon Pacific Mill & Lumber Company | 772.10       |             |
| First National Bank, San Francisco   |              |             |
| Clatsop County Lumber Company        | 5,721.44     |             |
| Office Fund                          | 4,137.25     |             |
| Wells Fargo Nevada Nat'l Bank, S. F. | 834.02       |             |
| Astoria Savings Bank                 | 750.17       |             |
| ACCOUNTS RECEIVABLE                  | Schedule #2. | 67,283.01   |
| Oregon Pacific Mill & Lumber Company | 15,516.55    |             |
| Brix Sand & Lumber Co.               | 4,631.19     |             |
| Wm. Lloyd Co.                        | 3,897.72     |             |
| Dant & Russell                       | 2,380.69     |             |
| Cartier-Holland Lumber Co.           | 1,179.50     |             |
| Chas. W. Corbaley                    | 1,156.25     |             |
| Chicago Mill & Lumber Co.            | 622.09       |             |

|                               |           |           |
|-------------------------------|-----------|-----------|
| U. S. Shipping Board          | 606.35    |           |
| U. S. Signal Corps            | 485.39    |           |
| Dutton Lumber Co.             | 319.41    |           |
| National Tank & Pipe Co.      | 143.64    |           |
| Farwest Milk Products Co.     | 94.32     |           |
| Clatsop County Lumber Company |           | 51,766.46 |
| U. S. Signal Corps            | 15,362.68 |           |
| Dant & Russell                | 11,746.82 |           |
| Brix Sand & Lumber Co.        | 5,384.02  |           |
| Wm. Lloyd Co.                 | 4,291.44  |           |
| U. S. Navy                    | 3,355.35  |           |
| Hutchins Lumber & Storage Co. | 3,274.16  |           |
| G. W. Gates Co.               | 2,678.64  |           |
| Oregon Box Mfg. Co.           | 1,805.35  |           |
| O. P. Menefee Lumber Co.      | 1,709.89  |           |
| Cartier-Holland Lumber Co.    | 1,117.97  |           |
| A. E. Lane Lumber Corp'n      | 800.85    |           |



|                                  |              |           |           |
|----------------------------------|--------------|-----------|-----------|
| Ross Higgins Co.                 | 206.09       |           |           |
| Peter F. Brock                   | 25.20        |           |           |
| National Tank & Pipe Co.         | 8.00         |           |           |
| NOTES RECEIVABLE                 | Schedule #3. |           | 2,004.05  |
| Oregon Pacific Mill & Lumber Co. |              | 2,004.05  |           |
| Brix Sand & Lumber Co.           |              | 2,004.05  |           |
| LUMBER STOCK                     | Schedule #4  |           | 34,110.95 |
| Clatsop County Lumber Co.        |              | 34,110.95 |           |
| Lumber 1,917,083 ft. @ \$17.50   |              | 33,548.95 |           |
| Lath 281,000 Pes. @ 2.00         |              | 562.00    |           |
|                                  |              | \$ 500.00 |           |

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

|                                     | Schedule #5. |            |
|-------------------------------------|--------------|------------|
| BONDS                               |              | \$500.00   |
| Clatsop County Lumber Co.           | 500.00       |            |
| U. S. Liberty Loan                  |              |            |
| PLANT & PROPERTIES                  | Schedule #6. | 320,387.63 |
| Purchased from Clatsop Mill Company |              |            |
| Principal                           | 275,000.00   | 278,536.00 |
| Cash Payments                       | 266,312.15   |            |
| Tax Liability As-                   |              |            |
| sumed                               | 8,687.85     |            |
| Interest                            | 3,536.00     |            |

"That certain sawmill plant together with all mill appliances known as the Clatsop Mill Company's sawmill plant situated in the City of Astoria, County of Clatsop, State of Oregon, together with all lands and premises upon which the same is located and including timber and all lands owned by the Clatsop Mill Company, situated in said County and State such being used and occupied in operating said sawmill and specifically described as follows:

DESCRIPTION: Block 144, 145, part of block 146 and two tracts of waterfront land adjoining on the North which extend to the established bulkhead or property line, in Shiveley's Addition to Astoria.

Said sawmill plant to include all machinery and equipment, the office building and furniture and all trucks of the Clatsop Mill Company at Astoria, Oregon, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, also the following described real estate, to wit:

|  |             |           |
|--|-------------|-----------|
| S $\frac{1}{2}$ of S $\frac{1}{2}$ .....   | Section 15, | 160 acres |
| NW $\frac{1}{4}$ of .....                  | " 21,       | 160 "     |
| SE $\frac{1}{4}$ of .....                  | " 22,       | 160 "     |
| SW $\frac{1}{4}$ of .....                  | " 23,       | 160 "     |
| NW $\frac{1}{4}$ of SE $\frac{1}{4}$ ..... | " 23,       | 40 "      |
| W $\frac{1}{2}$ of NE $\frac{1}{4}$ .....  | " 23,       | 80 "      |
| S $\frac{1}{2}$ of NW $\frac{1}{4}$ .....  | " 23,       | 80 "      |
| N $\frac{1}{2}$ of NW $\frac{1}{4}$ .....  | " 26,       | 80 "      |
| SE $\frac{1}{4}$ of NW $\frac{1}{4}$ ..... | " 26,       | 40 "      |

Total

960 "

Except a certain piece previously deeded to Willamette Pulp and Paper Company of 40 acres more or less.

All in Township 6 N., R. 9 W. of the Will. Mer., in Clatsop County, State of Oregon, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging."

Frd. 278,536.00 [91]



# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

|                                    |           |          |            |
|------------------------------------|-----------|----------|------------|
| Betterments & Preliminary Expense  |           | Brt Ford | 278,536.00 |
| Sprinkler System                   |           |          | 60,899.32  |
| Grinell Auto Sprinkler Equipment,  | 17,477.50 |          |            |
| Contract                           | 18,900.00 |          |            |
| Allowances                         | 1,422.50  |          |            |
| Tank                               |           |          | 25,513.74  |
| Pipe Fittings, etc.                |           |          |            |
| Labor                              |           |          |            |
| Installation                       | 451.78    |          |            |
| Wrecking old boiler                |           |          |            |
| setting                            | 110.00    |          |            |
| Mill Machinery & Equipment         |           |          | 9,893.03   |
| Saws & Knives                      |           |          |            |
| Chains, Grate Bars & Miscellaneous |           |          |            |
| Belts & Packing                    |           |          |            |

|                                    |          |          |
|------------------------------------|----------|----------|
| Hose, Extinguishers & Fire Buckets | 443.61   |          |
| Engine Repairs                     |          | 6,471.30 |
| Fly Wheel                          | 2,225.05 |          |
| Labor                              | 1,206.11 |          |
| Miscellaneous Supplies             | 1,181.40 |          |
| Waterking                          | 1,025.44 |          |
| Governor                           | 833.30   |          |
| Barracks                           |          | 3,789.36 |
| Labor                              | 1,481.31 |          |
| Plumbing                           | 1,337.69 |          |
| Lumber & Flooring                  | 404.65   |          |
| Hardware & Elect. Eqpt.            | 329.96   |          |
| Doors & Windows                    | 159.15   |          |
| Flags                              | 76.60    |          |

|                          |          |           |            |
|--------------------------|----------|-----------|------------|
| Wharf                    |          | 2,688.37  |            |
| Makela & Wuopio Contract | 1,578.98 |           |            |
| Lumber                   | 1,109.39 |           |            |
| Pony Band                |          | 2,065.77  |            |
| Purchase Cost            | 1,400.00 |           |            |
| Plans                    | 250.00   |           |            |
| Installation             | 156.03   |           |            |
| Freight                  | 154.74   |           |            |
| Services re Purchase     | 105.00   |           |            |
|                          | Frtd.    | 50,421.57 | 339,435.32 |
|                          |          |           | APR. [92]  |



|                                |          |          |
|--------------------------------|----------|----------|
| Chemical Engines               |          | 217.50   |
| 2 #20, 20 gal. Amer. La        |          |          |
| France—Champion Chemical       |          |          |
| Fire Engines                   | 200.00   |          |
| Hose                           | 17.50    |          |
| Motor                          |          | 200.45   |
| 7½ H. P. "An" Motor            | 200.45   |          |
| Miscellaneous Preliminary Exp. |          | 6,450.92 |
| Labor                          | 2,470.27 |          |
| Organization Expense           | 1,156.94 |          |
| Jno. J. O. O'Toole             | 484.09   |          |
| C. W. Corbaley                 | 400.25   |          |
| F. Dohrmann, Jr.               | 272.60   |          |
| Legal Expense                  | 655.60   |          |
| Premium U. S. Bond             | 500.00   |          |
| Whitewashing Mill Floor &      |          |          |



|                                     |        |           |
|-------------------------------------|--------|-----------|
| graveling roof                      | 483.45 |           |
| Elec. Equipment, Yard               | 387.47 |           |
| Repairs to Boilers sold (see below) | 281.85 |           |
| Watchmen, Preliminary Period        | 276.28 |           |
| Miscellaneous                       | 239.06 |           |
| Less:                               |        | 19,047.69 |
| Stumpage sold                       |        | 14,257.69 |
| Old Boilers                         |        | 3,000.00  |
| Rail, Shaftings & Misc'l Scrap      |        | 1,790.00  |
| APR. [93]                           |        |           |

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

## Schedule #7.

| ACCOUNTS PAYABLE                 |           |             |
|----------------------------------|-----------|-------------|
| Oregon Pacific Mill & Lumber Co. |           | 27,812.05   |
| Brix Bros. Logging Co.           | 15,136.41 |             |
| F. Dohrmann, Jr.                 | 7,999.96  |             |
| National Tank & Pipe Co.         | 1,550.00  |             |
| Pacific Fire Extinguisher Co.    | 1,165.00  |             |
| Title Ins. & Guar. Co.           | 700.00    |             |
| Suspense                         | 552.38    |             |
| J. W. McDonald                   | 468.75    |             |
| F. Howard Allen Co.              | 179.10    |             |
| Farwest Milk Products Co.        | 60.45     |             |
| Clatsop County Lumber            |           | 3,278.92    |
| U. S. Government                 | 688.13    |             |
| Astoria Box Co.                  | 323.68    |             |
| Clem W. Rogers                   | 250.00    |             |
|                                  |           | \$31,090.97 |

|                           |        |
|---------------------------|--------|
| Union Meat Co.            | 241.12 |
| Ross Higgins Co.          | 206.45 |
| Sunflower Dairy Co.       | 180.90 |
| Frye & Co.                | 160.19 |
| Prael Eigner Tr. Co.      | 150.50 |
| Allen & Lewis             | 140.90 |
| Farwest Milk Products Co. | 106.22 |
| Atlantic Paint Co.        | 104.00 |
| Standard Oil Co.          | 89.70  |
| Fisher Bros. Co.          | 83.80  |
| Ewart Electric Co.        | 81.01  |
| Lovell Auto Co.           | 79.20  |
| Simonds Mfg. Co.          | 79.03  |
| Collins Market            | 70.97  |
| H. M. Killian             | 50.87  |
| Allis-Chalmers Co.        | 50.00  |

|  |           |           |
|--|-----------|-----------|
| Marshall-Wells Co.   | 47.05     |           |
| M. M. White  | 50.00     |           |
| Hospital   | 45.20     |           |
| ESTIMATED FREIGHT  |           | 25,539.50 |
| Oregon Pacific Mill & Lumber Co.   |           |           |
|  | 9,889.16  |           |
| Clatsop County Lumber Co.  | 15,650.34 |           |
|  | ..        |           |
| TAXES PAYABLE  |           | 8,687.85  |
| Clatsop County Lumber Co.  |           |           |
| Tax Liability assumed by Ore.-Pac. M. & L. Co., upon purchase of Properties from Clatsop Mill Co., and subsequently transferred to Clatsop County Lumber Co. |           | 8,687.85  |

[94]

APR.

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

Schedule # 10.

## CAPITAL INVESTED

Oregon Pacific Mill & Lumber  
Co.

Capital Stock issued

Less issued for Intangible

Property

Agreement with U.

S. authorities to  
execute a Con-  
tract,

110,000.00

Option on Prop-  
erties of Clatsop

Mill Co.

15,000.00

Incorporators

shares

1,000.00

APR. [95]

\$25,000.00

25,000.00

151,000.00

126,000.00



## COMBINED NET CAPITAL INCOME &amp; EXPENDITURE ACCOUNT.

NOVEMBER 28, 1917, TO NOVEMBER 30, 1918.

CAPITAL INCOME: \$433,062.84

Capital invested 25,000.00

Advanced by C. W.

Rogers 315,000.00

Other liabilities in-

curred 65,318.32

Operating Profit 27,744.52

CAPITAL EXPENDITURE: 433,062.84

Invested in Plant &amp;

Properties 320,387.63

Invested in Current

&amp; Miscellaneous As-

sets 112,675.21

APR. [96]

## GENERAL REPORT.

The Oregon Pacific Mill & Lumber Company, a Nevada Corporation, was organized November 28, 1917. The first Directors' Meeting was held December 8, 1917, on which date \$125,000.00 Par Value Capital Stock was authorized to be issued to Mr. C. W. Corbaley, \$15,000.00 thereof for the assignment of an option for the purchase of the properties of the Clatsop Mill Company and \$110,000.00 for the purchase from C. W. Corbaley of an agreement between himself and the constituted authorities of the United States, expressing their readiness to execute with him a contract for One Million feet of Spruce, cut to Government Specifications, per month, at a price of One Hundred

and Five Dollars per thousand feet, for a period of eighteen months commencing December 1, 1917. One thousand Dollars (\$1,000.00) Par Value Capital Stock had been issued as Incorporators Shares, which made a total of \$126,000.00 Par Value Capital Stock issued for intangible property. For the purpose of this report, we have entirely eliminated this Stock, and show as Capital Invested \$25,000.00 which was actually paid in in Cash.

On January 8, 1918, a certain Contract was made between the Corporation and Mr. Clem W. Rogers whereby, in consideration of the advance of at least \$300,000.00, and to secure the repayment of same under certain specified conditions, all the properties of the Corporation, real, personal and mixed were transferred and assigned to Mr. Clem W. Rogers. The corporation did not fully comply with the conditions of this Contract in so far as the time of repayments of money advanced, and in the month of September, 1918, certain of the properties of the Corporation came into possession of Mr. Clem W. Rogers, Grantee, and from October 1, 1918, these properties have been operated by Mr. Rogers [97] in the name of the Clatsop County Lumber Company.

For the purposes of this Combined Report we have eliminated the book valuations placed upon the properties when they were taken over by Mr. Clem W. Rogers, which valuations have entered into the books of the Clatsop County Lumber Company, and have exhibited the dealings with these properties since their original acquirement from

the Clatsop Mill Company as if no change in ownership and management had occurred.

In the books of the Oregon Pacific Mill & Lumber Company expenditures of considerable amount, which were in the nature of either of Betterments or Preliminary Expense, properly Capital Expenditure, had been charged as Operating Expenses. We have abstracted these items where it seemed proper to do so, revised the Profit & Loss Account accordingly, and included them in Schedule #6 hereinbefore, where they can be reviewed in complete detail.

In regard to the Net Profit of \$27,744.52 exhibited, particular attention is directed to the fact that this is without consideration either of Accrued Taxes or Depreciation.

ROBINSON AND BOURS,

Certified Public Accountants.

APR. [98]

The witness next produced and identified Plaintiff's Exhibit 5, which is as follows:

**Plaintiff's Exhibit No. 5.**

SIGNAL CORPS, UNITED STATES ARMY—

Contract No. SPD-4.

**CONTRACT FOR SPRUCE LUMBER.**

THESE ARTICLES OF AGREEMENT, entered into this twenty-second day of December, 1917, by and between Oregon Pacific Mill & Lumber Co., a corporation organized and existing under the laws of the State of Nevada and located at Astoria, Oregon, hereinafter called the "Seller" and

the United States of America, hereinafter called the "Government" represented by J. Van D. Crisp, First Lieutenant, Signal Corps of the United States Army, hereinafter called the "Contracting Officer," and under the direction of the Secretary of War, Witnesseth:

WHEREAS, Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States of America and the Imperial German Government, constituting a national emergency; and

WHEREAS, on September 7, 1917, under the provisions of Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, the President, acting through the Secretary of War, commanded that all orders placed with the Seller by the Equipment Division of the Signal Corps be fulfilled and required that said Seller proceed with all possible haste with the production of spruce lumber for the manufacture of airplanes in accordance therewith, and with the further requirement that the Seller give preference to such orders over all other orders and contracts of said Seller:

Now, therefore, under the provisions of said Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, and in accordance with the foregoing command, the President hereby places an order with the Seller with the requirement that it comply with the contract hereinafter set forth, and [99] in consideration of the mutual agreements herein contained, the par-



ties hereto have agreed and by these presents do agree to and with each other as follows:

ARTICLE I. The Seller hereby sells to the Government and the Government hereby purchases from the Seller, in accordance with the terms and conditions hereinafter set forth Ten Million (10,000,000) feet of spruce lumber within the period of eighteen months next ensuing which shall conform in all respects to the requirements and provisions of Standard Specifications No. 1 hereto attached, or such modification thereof as the Government shall hereafter from time to time adopt.

ARTICLE II. The Seller agrees to deliver five hundred & sixty thousand (560,000) or more of said spruce, during each month, commencing with the month of January, 1918, and continuing until the expiration of this contract. Time is of the essence of this agreement, and in the event that for any reason deliveries in any months shall be less than five hundred & sixty thousand board feet, (560,000), the Government may elect not to accept any deficiency, but if such election be not made in writing, delivered to the Seller within ten (10) days after the end of the month in which any such deficiency occurs, the deficient amount shall be delivered in the next succeeding month following that in which the deficiency occurred or as soon thereafter as possible, which the Government agrees to accept. The deficiencies, however, will not be accepted by the Government after the expiration of the period covered by this agreement. The Seller shall not be held liable for delays in deliv-



eries caused by strikes, fires, floods, riots, acts of God or the public enemy, or any other cause beyond the control or without the fault of the Seller, provided that nothing [100] herein contained shall impair the Government's right herein given to refuse to accept any deficiency in deliveries in any month.

ARTICLE III. Deliveries of said spruce shall be made by the Seller to the Government free on board cars at the mill of production, but if the Government shall notify the Seller within a reasonable time in advance of its intention to ship any part of said spruce by water, and the Seller's mill be adjacent to water, the delivery of that part of said spruce shall be free alongside ship at mill of production, but any lighterage charge or any expense or rehandling after delivery as above specified shall be paid by the Government.

If said delivery is to be made on board cars, said spruce lumber shall be loaded by the Seller on cars, each course being of uniform thickness, with  $\frac{3}{8}$ " thick cross sticks not more than four feet apart between each layer, and the ends butted. Each entire carload shall be protected by a sound board top cover of one inch lumber with joints battoned, fastened together with cross bats and nails, and placed securely under top binders, but not fastened to the car stakes. No nails shall be driven into Spruce lumber.

The Government shall have preference of all flat and open top or gondola cars furnished to the Seller for delivering the spruce lumber herein

contracted for, and the Seller agrees that such open or gondola cars will be used in shipping the spruce lumber whenever it is possible to obtain the same.

ARTICLE IV. All said spruce lumber to be delivered under this contract shall be inspected at the time of delivery as to compliance with the specifications hereto attached, or such modification thereof as the Government shall adopt, and as to measurement, [101] at the mill of Seller by inspectors authorized by the government, which inspection shall be final. The Government hereby reserves the right to refuse, and to mark the letters "C. S." in crayon on any spruce lumber found on such inspection not to be in compliance with specifications hereto attached, or such modification thereof as the Government shall adopt. The Seller shall provide such grading in advance of inspection by inspectors authorized by the Government as will facilitate said inspection.

ARTICLE V. The price to be paid for such spruce lumber to the Seller by the Government shall be One Hundred & Five & no/100 Dollars—(\$105.00) per one thousand (1000) board feet, based on measurements noted in specifications hereto attached, or such modification as the Government shall adopt.

ARTICLE VI. Payments shall be made for spruce lumber so delivered within a reasonable time after the presentation to the Officer in Charge of Disbursing Sec., Spruce Prod. Div. of the Signal Corps, or of his duly authorized representative,

hereinafter called the "Disbursing Officer" of Seller's invoice, including piece tally manifests, documents showing delivery free on board cars or free alongside ship at mill of production, and certificate of inspection executed by inspectors authorized by the Government, certifying to the measurement of the lumber so delivered and its compliance with specifications hereto attached, or such modification as the Government shall adopt, and upon a voucher wherein the said disbursing Officer shall certify the amounts to be so paid, and that the same have been determined by him to be due and payable to the Seller in accordance with the provisions of this contract.

All other payments which may become due to the Seller under this contract shall be made as soon as possible [102] after the same shall become due, upon a voucher wherein the Disbursing Officer shall certify the amount to be so paid, and that the same have been determined by him to be due and payable to the Seller.

ARTICLE VII. The Government hereby reserves the right at any time during the period covered by this contract to change, alter and amend the Standard Specifications No. 1 attached to this agreement in such particulars as it may deem advisable, provided, however, that if any change or changes in grade or specifications hereto attached are made by the Government, it is agreed that a corresponding change shall be made in the price. The Seller agrees that it will comply with

all the terms of such specification as changed, altered or amended by the Government.

ARTICLE VIII. It is further understood, contracted and agreed that in view of the situation attempted to be met by this and similar contracts and the emergency now existing calling for the delivery of a large amount of spruce to satisfy the Government's needs, that the Seller will, from and after the signing of this Contract, run and operate its mill to its fullest capacity, running night and day shifts, if possible, and necessary, and that he will, during the period covered by this contract, buy all logs suitable for construction in airplanes offered by any logger or producer without discrimination on account of the individual for any cause, and will pay therefor the full price as set and determined by the Government, the quantity and quality to be governed by the grading rules established by the Government.

ARTICLE IX. It is further contracted and agreed that the Seller shall saw, manufacture and deliver the lumber herein contracted [103] to be delivered in a good and workmanlike manner and to the satisfaction of the Government. And if at any time the Government should determine that the Seller is not complying with this clause of the contract, the Government may at once terminate this contract and decline to receive any more lumber from the Seller.

ARTICLE X. Neither this contract nor any interest therein shall be transferred as assigned by the Seller to any person, firm or corporation, with-



out the written consent of the Government, and in case of such transfer, without its written consent, the Government may refuse to carry out this contract, either with the transferor or transferee, but all rights of action for any breach of this contract by said Seller are reserved to the Government.

ARTICLE XI. No member of or delegate to Congress, or resident commissioner is or shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. But this article shall not apply to this contract so far as it may be within the operation or exceptions of Section 116 of Act of Congress, approved March 4, 1909 (35 Stats. 1109).

ARTICLE XII. No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor, which has been imposed by any court of any of the several States, Territories or municipalities having criminal jurisdiction.

ARTICLE XIII. Any notice or other communication to be given by the Government to the Seller under this agreement shall be given to the Seller at Astoria, Oregon, and any notice to be given under this agreement to the Government, shall be [104] addressed to the Officer in Charge of SPRUCE PROD. DIV. of the Signal Corps, War Department, 507-517 Yeon Building, Portland, Oregon.

ARTICLE XIV. This contract shall be subject to the approval of the Chief Signal Officer, United States Army.



IN WITNESS WHEREOF, the Seller has caused this contract to be executed by its proper officer duly authorized, and the Government has caused this contract to be executed by the undersigned Contracting Officer herein duly authorized.

Signed by Parties Named in the Contract  
and Signatures Witnessed.

Approved: Portland, Oregon, Dec. 28, 1917.

BRICE P. DISQUE,

Colonel, Signal Corps, U. S. A.

Approved: Mar. 27, 1918. By Authority of the Chief Signal Officer. (Authorization of July 11, 1917.)

A. C. DOWNEY,

Major, Signal Corps. [105]

#### STANDARD SPECIFICATIONS No. 1. THICKNESS.

2" to 6" inclusive, at least 60% to be 3" and 4" thick. Not more than 40% 2"-5" and 6" thick.

#### WIDTH.

All to be 4" and wider, not over 10% under 5" wide.

#### LENGTH.

50% to be 18' and longer; 50% to be 4' and longer.

#### MEASUREMENT.

Widths and thickness fractional inches—lengths in multiples of one foot.

#### GRAIN.

All lumber 3" and thicker shall not be less than 70% vertical grain of an angle of 45 degr. to 90 degr. on each carload.

All lumber 2" thick shall not be less than 30% vertical grain of an angle of 45 degr. to 90 degr. on each carload.

#### GRADES.

The 50% of all lumber 18' and longer shall be clear four sides, straight grained, not less than six annular growth rings for each one inch, sound and well manufactured, free from shakes, spiral and curly grain.

This grade will admit of bright sap, wane, pin worm holes, slight variations in sawing or other defects that will not impair its use for wing beams.

The 50% of all lumber 4' and longer shall yield clear cuttings, straight grained, not less than six annual growth rings per each one inch, sound and well manufactured, free from shakes, spiral and curly grain; same may contain knots, pitch pockets, wane, pin worm holes, slight variations in sawing and other defects that will not impair its use for the purpose intended, providing, however, that each piece must produce, for buyer, clear straight grain cuttings from 4' to 17' lengths, which shall not include over 5% of such cuttings 4' to 7' inclusive.  
[106]

EXTRACT FROM MINUTES OF A REGULAR  
MEETING OF THE BOARD OF DI-  
RECTORS OF THE OREGON PACIFIC  
MILL & LUMBER COMPANY held this  
eighteenth day of December, 1917, at 10:30  
o'clock A. M., at the office of the Company,  
135 Stockton Street, San Francisco, California.

There were present Directors F. Dohrmann, Jr., C. W. Corbaley and J. W. McDonald, Jr.; Absent: Directors F. K. Eckley and Jno. J. O'Toole.

"On motion duly seconded, it was unanimously

"RESOLVED: That the Vice-President and Manager of this Company, Mr. C. W. Corbaley, be and he hereby is authorized to execute a contract on behalf of this Company with the Spruce Production Division of the Signal Corps, United States Army for delivery to said Division of Spruce lumber in the approximate quantity of ten million (10,000,000) feet, as per copy of contract which is attached to and made a part of these Minutes."

I, I. Fuendeling, Assistant Secretary of the Oregon Pacific Mill & Lumber Company, hereby certify the above to be a full, true and correct extract from the Minutes of a meeting of the Board of Directors held this 18th day of December, 1917, at the office of the Company.

[Corporate Seal]

I. FUENDELING,  
Assistant Secretary. [107]

The witness next produced and identified Plaintiff's Exhibit 6, which, among many other things, assigns all spruce production contracts from the United States of America to the United States Spruce Production Corporation, and it is dated October 10, 1918.

The witness then testified that the claim of Rogers was presented to the Contract Board of the United States Spruce Production Corporation, which was a board appointed by the President of

the corporation for the purpose of hearing and determining claims which arose out of the operation of the Spruce Production Division and of the Spruce Production Corporation in connection with the Government's program for the production of airplane material in this district, and that this Contract Board on the 29th day of January, 1919, filed their findings, which the witness then produced and identified and they were introduced in evidence as Plaintiff's Exhibit 7, and are as follows:

**Plaintiff's Exhibit No. 7.**

**WAR DEPARTMENT SPRUCE PRODUCTION DIVISION BUREAU AIRCRAFT PRODUCTION.**

Yeon Building, Portland, Ore., Jan. 29, 1919.

**FROM:** The Contract Board. To Board of Trustees, U. S. Spruce Production Corporation, Portland, Oregon.

**SUBJECT:** Claim #44, Clement W. Rogers, Astoria, Oregon.

1. The Oregon-Pacific Mill & Lumber Company had contract SPD-4 with this Division, dated December 22, 1917, for 10,000,000' of airplane spruce lumber, deliveries to be made at the rate of 560,000' per month, commencing January 1918. This mill was operated by Charles W. Corbaley and advances in large sums of money which in the final analysis amounted to \$315,000.00 were made for this operation by Mr. Clement W. Rogers of San Francisco, California.



2. Through mismanagement on the part of Mr. Corbaley, this mill was finally taken over by Mr. Rogers and a new contract SPD-261 was entered into with Mr. Rogers doing business under the name of the Clatsop County Lumber Company. This contract dated October 8th was for 6,200,000' of spruce airplane lumber on which deliveries were to be made at the rate of 560,000' per month commencing with October 1918, it being part of one of the provisions of this contract that SPD-4 above mentioned was cancelled and superseded by this contract SPD-261. Contract SPD-261 although properly signed and approved has never been delivered to the officials of the Clatsop County Lumber Company.

3. Deliveries under these two contracts total approximately 3,700,000' of lumber prior to the cessation of all activities of this Division on November 12th, whereas if the terms of contract SPD-4 and SPD-261 had been lived up to there should have been delivered on November 12th 5,600,000' or a total of the ten months, agreed contract amount. This would leave an undelivered balance of 4,400,000'.

4. The original purchase price of this mill and timber [108] which timber included approximately 16,000,000' of spruce; 10,000,000' of fir and 16,000,000' of hemlock was \$278,000.00 and claimants further state that if there was expended \$60,000.00 for improvements which included barracks for soldier labor, sprinkler system and other necessary repairs to put the mill in operating condi-



tion. Claimant states that the total debits of his investment are \$385,584.42 and that the total credits are \$191,693.21, leaving a net loss of \$193,891.21, which sum is the amount asked in reimbursement of their claim. In the credit items of above amount is an amount of \$100,000.00 which is considered salvage value on the investment, and, of course, this figure is a debatable one, in view of market conditions for lumber and the attitude of investing capital as to whether or not the mill is a saleable proposition now or within the next six months.

5. The Board does not recognize the entire claim of Mr. Rogers because of the fact that his mill was operating at a loss while under the direction of Mr. Corbaley and the Board cannot consistently recommend consideration of repayment of losses sustained by reason of one individual permitting his affairs to be managed by another individual, when the second individual through his own negligence causes such losses. On the other hand, the Board recognizes the fact that there is still an open contract for the delivery of 4,400,000' of airplane spruce lumber without a cancellation clause attached and upon which claimant can rest his claim, especially in view of the fact that during the last couple of months the operation of this mill under the new manager, Mr. Brown, it is evident that the mill was producing lumber at a profit. There is a further consideration, that under instructions from Lieutenant Colonel Hitchcock, the Grant Smith-Porter Brothers Company [109]

acting as cost plus operators for this Division signed a selective logging contract with the claimant, which contract, claimant states, was signed as a result of a letter from Colonel Hitchcock under date of August 22, 1918, in which they were advised that if said contract was not signed it would be necessary to commandeer the timber. It is to be recorded here that, of course, claimants signed the contract in perfectly good faith, but it is also to be noted that the selective logging of a piece of property does not leave the timber in a position to be known as a good commercial logging "show" and for that reason it is questionable as to what value the timber has in relation to its connection with the mill when it comes to a proposition of salvaging this mill be sale. The credit item, therefore, of \$100,000.00 as figured in their statement of claim is a debatable one.

6. The Board in attempting to arrive at a basis of settlement which does not include the consideration of estimated profits, but which would seem fair and acceptable to the claimant as well as the Division, has made computation as follows:

|                           |              |
|---------------------------|--------------|
| Original investment ..... | \$278,000.00 |
| Improvements .....        | 60,000.00    |

---

\$338,000.00

(On account of the fact that the contract should have been 56% completed, there should have been

written off 56% of \$338,000.00, leaving a balance to be assumed as a portion of this claim.)

To be claimed ..... \$148,720.00

Less salvage value ..... 100,000.00

---

NET LOSS .... \$ 48,720.00

7. Mr. Rogers requests reimbursement in the sum of 193,891.21, but the Board offered him in settlement \$48,720.00. Mr. Rogers refused to accept this. The Board then reconsidered the matter and in view of the fact that the item of \$100,000.00 [110] salvage, as above stated, is questionable, the Board made a second offer to Mr. Rogers of \$60,000.00 which was accepted, as evidenced by the attached waiver properly signed.

8. The Board, therefore, recommends that the claimant, Clement W. Rogers be reimbursed in the sum of \$60,000.00 in full and final settlement of any and all claims growing out of the cancellation of Contracts SPD-4 and SPD-261, it being understood and agreed that this settlement covers all claims of Clement W. Rogers, the Oregon-Pacific Mill & Lumber Company and the Clatsop County Lumber Company.

THE CONTRACT BOARD.

(Sgd.) FRANK D. EAMAN.

FRANK D. EAMAN, Major, A. S. A. P.,  
President.

(Sgd.) E. G. GRIGGS,

E. G. GRIGGS, Major A. S. A. P.,

(Sgd.) C. SQUIRES,

C. SQUIRES, Captain, A. S. A. P.,  
Recorder.

Date 2/6/19.

Approved:

(Sgd.) BRICE B. DISQUE,  
BRICE B. DISQUE, Brigadier General,  
U. S. A. President, U. S. S. P. Corp'n.  
CS-DOB. [111]

CLAIM NO. 44.  
ACCEPTANCE.

January 29, 1919.

I hereby agree to accept the sum of \$60,000.00 in full payment and satisfaction of any and all claims and demands we have or may have against the United States Spruce Production Corporation or Spruce Production Division, Bureau of Aircraft Production, U. S. Army, in any way growing out of our contracts SPD-4 and SPD-261, or as represented by our claim No. 44, heretofore filed with the Contract Board.

CLEM. W. ROGERS.

Witnesses:

C. SQUIRES,  
RAYMOND M. ALLEN. [112]

The witness next produced and identified and there was introduced in evidence Plaintiff's Exhibit No. 8, [54] which was a check from the United States Spruce Production Corporation to C. W. Rogers, Astoria, Oregon, for \$60,000.00 and counsel for defendant Rogers admitted that he received this money.

The witness next produced and identified and there was introduced in evidence Plaintiff's Exhibit No. 9, which is as follows:



**Plaintiff's Exhibit No. 9.**

“Claim No. 44.

**RELEASE.**

WHEREAS, C. W. Rogers, sole trader doing business under the name of Clatsop County Lumber Co. hereinafter referred to as the Contractor, heretofore entered into a contract with the United States of America, hereinafter referred to as the Government, for the sale and delivery to the Government of Spruce Lumber desired for airplane material, said contract being No. SPD.-261 superseding Contract No. SPD-4, and dated October 8, 1918, and which contract was later assigned by the Government to the United States Spruce Production Corporation; and

WHEREAS, owing to the cessation of hostilities in the war between the United States and its Allies and the Imperial Government of Germany, the Government has discontinued its purchase of airplane material and it has been found necessary to cancel said contract; and

WHEREAS, the Contractor claims certain damages by reason of such cancellation and has filed claim therefor with the Contract Board appointed for the purpose of considering and adjusting such claims, under General Orders No. 34, dated November 22, 1918, issued by the Commanding General of the Spruce Production Division, Bureau of Aircraft Production of the United States Army; and [55]



WHEREAS, said Contract Board has allowed said claim in the sum of Sixty Thousand (\$60,000.00) Dollars, and the contractor has agreed to accept said award in full settlement and satisfaction of all claims or rights against either the Government or said United States Spruce Production Corporation, arising out of said Contract.

NOW, THEREFORE, THIS INSTRUMENT WITNESSETH: That, in consideration of the sum of Sixty Thousand (\$60,000.00) Dollars paid to said Contractor by the United States Spruce Production Corporation, the receipt of which sum is hereby acknowledged, said Contractor hereby acknowledges full satisfaction of all claims and demands against the United States of America and said United States Spruce Production Corporation or either of them growing out of or based on the above-mentioned Contract No. SPD.-261 and No. SPD.-4, or otherwise, and hereby releases the United States and the said United States Spruce Production Corporation from all liability, claim or demand whatsoever which said Contractor may have or claim to have, whether now existing or hereinafter arising, growing out of the aforesaid contract or its cancellation or in any manner based thereon, as well as all claims or demands of every kind and character whatsoever arising out of or in connection with any operations of the contractor or dealings of any kind had between the contractor and the Government or the United States Spruce Production Corporation, or either of them, and its on their officers, agents or representatives.

IN WITNESS WHEREOF, said contractor has executed this release this 20th day of February, 1919.

C. W. ROGERS.

C. W. ROGERS, Sole Trader Doing Business  
as Clatsop County Lumber Co.

Signed in the presence of

C. M. RIDER.

WM. J. GIBSON.

Approved: Major, A. S. A. P., U. S. A., Mgr.  
Legal Department." [56]

The witness next produced and identified and there was offered in evidence Plaintiff's Exhibit No. 10, which is as follows: [57]

**Plaintiff's Exhibit No. 10.**

SIGNAL CORPS, UNITED STATES ARMY.

10/3/18

Contract No. SPD-261.

(b)

CONTRACT FOR SPRUCE AIRPLANE  
LUMBER.

THESE ARTICLES OF AGREEMENT, entered into this 8th day of October, 1918, by and between Clement W. Rogers, a sole trader, doing business at Astoria, Oregon, under the name of Clatsop County Lumber Company, party of the first part, hereinafter called the "Seller," and the United States of America, hereinafter called the "Government," represented by Prescott W. Cookingham, Captain, A. S. A. P., United States

Army, hereinafter referred to as the "Contracting Officer," acting by the authority of the Chief Signal Officer of the United States Army, and under the direction of the Secretary of War, party of the second part, WITNESSETH:

WHEREAS, Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States of America and the Imperial German Government, constituting a national emergency;

Now, therefore, under the provisions of Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of the United States and executive orders of the President of the United States, or heads of its departments, under which requirements for advertisements for proposals are dispensed with and contracts in the form hereof are duly authorized, the President hereby places the following order with the Seller with the requirement that it comply with the contract hereinafter set forth, and in consideration of the mutual agreements herein contained, said parties have agreed and by these presents do agree to and with each other as follows, viz:

ARTICLE I. The Seller hereby agrees to sell to the Government, [113] and the Government hereby agrees to purchase from the Seller, in accordance with the terms and conditions hereinafter set forth six million two hundred thousand board feet of spruce airplane lumber within the period ending June 30, 1919, which shall con-

form in all respects to the requirements and provisions of the specifications hereto attached, or such modification thereof as the Government shall hereafter from time to time adopt.

ARTICLE II. The Seller agrees to deliver not less than five hundred sixty thousand (560,000) board feet of said lumber during each month, commencing with the month of October, 1918, and continuing until the expiration of this contract. Time is of the essence of this agreement, and in the event that for any reason deliveries in any months shall be less than the amount last above specified, the Government may elect not to accept any deficiency, but if such election be not made in writing, delivered to the Seller within ten (10) days after the end of the month in which any such deficiency occurs, the deficient amount shall be delivered in the next succeeding month following that in which the deficiency occurred or as soon thereafter as possible. The deficiencies, however, will not be accepted by the Government after the expiration of the period covered by this agreement. The Seller shall not be held liable for delays in deliveries caused by strikes, fires, floods, riots, acts of God or the public enemy, or any other cause beyond the control or without the fault of the Seller, provided that nothing herein contained shall impair the Government's right herein given to refuse to accept any deficiency in deliveries in any month.

ARTICLE III. Deliveries of said lumber shall be made by the [114] Seller to the Government



free on board cars at Astoria, Oregon, but if the Government shall notify the Seller within a reasonable time in advance of its intention to ship any part of said lumber by water, and the Seller's mill be adjacent to water, the delivery of that part of said lumber shall be free alongside ship at mill of production, but any lighterage charge or any expense or rehandling after delivery as above specified shall be paid by the Government.

The said lumber shall be loaded in the manner provided in the specifications attached hereto or in the absence of any provisions in the specifications, it shall be loaded to the satisfaction of the carrier receiving the same.

ARTICLE IV. Before loading, all said lumber to be delivered under this contract shall be inspected at the time of delivery as to compliance with the specifications hereto attached, or such modification thereof as the Government shall adopt, and as to measurement at Astoria, Oregon, by inspectors authorized by the Government, which inspection and measurement shall be final. The Government hereby reserves the right to refuse, and to mark the letters "C. S." in crayon on any lumber found on such inspection not to be in compliance with the specifications hereto attached, or such modification thereof as the Government shall adopt. The Seller shall provide such grading in advance of inspection by inspectors authorized by the Government as will facilitate said inspection.



ARTICLE V. The price to be paid for such lumber to the Seller by the Government shall be One Hundred Seventy-five (\$175.00) Dollars per thousand for Wing Beam Stock (Grade "A"); Eighty (\$80.00) Dollars per thousand for Long Clears (Grade "B"); and Forty-five (\$45.00) Dollars per thousand for Short and Thin [115] Clears (Grade "C") all per one thousand (1000) board feet, based on measurements noted in specifications hereto attached, or such modification as the Government shall adopt.

ARTICLE VI. Payments shall be made for said lumber so delivered within a reasonable time after the presentation to the Officer in Charge of Disbursements, Spruce Production Division, of the Signal Corps, Yeon Building, Portland, Oregon, or his duly authorized representative, hereinafter called the "Disbursing Officer," of Seller's invoice, including piece tally manifests, documents showing delivery free on board cars or free alongside ship at mill of production, and certificate of inspection executed by inspectors authorized by the Government, certifying to the measurement of the lumber so delivered and its compliance with specifications hereto attached, or such modification as the Government shall adopt, and upon a voucher wherein the said Disbursing Officer shall certify the amounts to be so paid, and that the same have been determined by him to be due and payable to the Seller in accordance with the provisions of this contract.

ARTICLE VII. The Government hereby reserves the right at any time during the period covered by this contract to change, alter and amend the specifications attached to this agreement in such particulars as it may deem advisable, provided, however, that if any change or changes in grade or specifications hereto attached are made by the Government, it is agreed that a corresponding change shall be made in the price. The Seller agrees that it will comply with all the terms of such specification as changed, altered or amended by the Government.

ARTICLE VIII. It is further understood and agreed that in view of the emergency now to be met, the Seller will produce [116] and operate hereunder to the fullest capacity possible under the circumstances, and that he will during the period covered by this contract, buy at prices set and determined by the Government, sufficient stumpage, logs and other materials to enable the Seller to comply with his obligations hereunder, without discrimination on account of the individual or other cause, the quantity and quality to be determined by the grading rules established by the Government.

ARTICLE IX. It is further contracted and agreed that the Seller shall saw, manufacture and deliver the lumber herein contracted to be delivered in a good and workmanlike manner and to the satisfaction of the Government. And if at any time the Government should determine that the Seller is not complying with this clause of the

contract, the Government may at once terminate this contract and decline to receive any more deliveries from the Seller.

ARTICLE X. Neither this contract nor any interest therein shall be transferred or assigned by the Seller to any person, firm or corporation, without the written consent of the Government, and in case of such transfer, without its written consent, the Government may refuse to carry out this contract, either with the transferor or transferee, but all rights of action for any breach of this contract by said Seller are reserved to the Government.

ARTICLE XI. No member of or delegate to Congress, or resident commissioner, is or shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. But this article shall not apply to this contract so far as it may be within the operation or exceptions of Section 116 of Act of Congress, approved March 4, 1909 (35 Stats. 1109).

ARTICLE XII. No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor, which has been imposed by any [117] court of any of the several States, Territories or municipalities having criminal jurisdiction.

ARTICLE XIII. Any notice or other communication to be given by the Government to the Seller under this agreement shall be given to the Seller at Astoria, Oregon, and any notice to be given under this agreement to the Government, shall

be addressed to the Officer in Charge of Contracts of the Spruce Production Division, Bureau of Aircraft Production, Yeon Building, Portland, Oregon.

ARTICLE XIV. This contract shall be subject to the approval of the Director of Aircraft Production.

ARTICLE XV. The Government may assign this contract to the United States Spruce Production Corporation or to such other concern as may be mutually agreed upon, and the assumption by such Corporation or concern of the Government's obligations under this Contract shall relieve the Government of any responsibility or liability hereunder.

ARTICLE XVI. Whereas, the Oregon Pacific Mill & Lumber Company has a contract, No. SPD-4, dated December 17, 1917, to furnish spruce airplane lumber to the Government, and

WHEREAS, the Clatsop County Lumber Company has succeeded to all the rights, obligations and property of the said Oregon Pacific Mill & Lumber Company, and the above mentioned Clement W. Rogers has been given authority by the resolution of the Oregon Pacific Mill & Lumber Company hereto attached to cancel said contract,

It is agreed that said contract, dated December 17, 1917, shall be and is hereby cancelled as of September 30, 1918.

O. K.—C. W. R.

IN WITNESS WHEREOF, the Seller has caused this contract [118] to be executed by



its proper officer duly authorized, and the Government has caused this contract to be executed by the Undersigned Contracting Officer herein duly authorized.

Exhibit Signed by Parties Named in Body  
of This Instrument.

Witnesses:

Approved: Oct. 11, 1918.

G. E. BREECE,

Major, A. S. A. P. Approvals Officer.

Approved: Oct. 14, 1918.

R. S. ESKRIDGE,

Major, A. S. A. P.

Approved: Oct. 17, 1918.

By Authority of Director Aircraft Production.

BRICE P. DISQUE,

Brigadier General, U. S. Army, Commanding  
Spruce Production Division. [119]

**Testimony of Clem W. Rogers, in His Own Behalf.**

Mr. CLEM W. ROGERS, the defendant, testified in substance as follows:

He was a resident of San Francisco and was the financial representative of Mr. C. S. Howard, a wealthy man of San Francisco. In the latter part of 1917 C. W. Corbaley had secured an option to purchase the sawmill and timber of the Clatsop Mill Company at Astoria, Oregon, and had secured a contract (it was really a tentative arrangement) from the United States Government to manufacture airplane spruce. With Mr. Corbaley were associated J. W. McDonald and Mr. Dohrmann, a



(Testimony of Clem W. Rogers.)

San Francisco capitalist, and these gentlemen formed the Oregon Pacific Mill & Lumber Company, a Nevada corporation, for the purpose of taking over the said properties on which Corbaley had secured an option and making a contract, following the tentative arrangements which Corbaley made with the Government to manufacture airplane spruce. Their plan was to secure advances of money from the United States Government on their contract with which they intended to pay for the sawmill and timber and finance their operations. The government would not advance them money unless they put up a satisfactory surety bond, and this necessitated indemnifying a surety company before it would put up the required bond. About the 20th of December, 1917, Mr. Rogers, as Howard's financial agent, was approached to see whether he would furnish the required indemnity, with the result that Mr. Howard deposited with the surety company, \$300,000.00 in bonds to secure it against liability on the bond. To define the rights of the parties in this transaction the following indenture, Defendant's Exhibit "A," was executed:

**Defendant's Exhibit "A."**

**"THIS INDENTURE**

Made and entered into this 8th day of January, 1918, by and between [58] Clem W. Rogers, of the City and County of San Francisco, State of California, Party of the First Part, and Oregon Pacific Mill & Lumber Company (a Nevada Cor-

poration) and F. Dohrman, Jr., C. W. Corbaley, J. W. McDonald, Jr., F. K. Eckley and John J. O'Toole, of the City and County of San Francisco, State of California, both as Directors and sole stockholders of the said corporation, Parties of the Second Part:

#### WHEREAS

The said Party of the First Part has loaned or is about to loan to the said Corporation Party of the Second Part, and for its use and benefit, securities of the agreed value of at least the sum of Three Hundred Thousand Dollars (\$300,000.00), at the special instance and request of the said Parties of the Second Part; and

#### WHEREAS

The said Parties of the Second Part have and each of them has requested of the said Party of the First Part that he do and perform each and all of the things and acts hereinafter referred to on his part to be performed; and

#### WHEREAS

The said Corporation Party of the Second Part is the owner of a certain agreement of purchase of a portion of the property of the Clatsop Mill Company, a Corporation, which said agreement is dated December 3, 1917, and is by this reference incorporated in and made a part of this INDENTURE: and

#### WHEREAS

The said Party of the First Part has rendered and is now rendering to the said Party of the

Second Part certain services of a very valuable nature:

NOW THEREFORE THIS INDENTURE WITNESSES: That [59] for and in consideration of the premises and in further consideration of the true and faithful performance of all the terms and conditions of this INDENTURE, the said Parties of the Second Part do, and each of them does, by these presents, grant, bargain, sell, convey, confirm, transfer, assign, set over and deliver to the said Party of the First Part, all of their and each of their, right, title, estate and interest of every kind and character in and to all and every part of the property of the said Corporation Party of the Second Part, real, personal and mixed, which it may now own or hereafter acquire, including any and all options, contracts, rights, leases, titles and interest of every kind and character and in particular all contracts with the Government of the United States, and all interests arising under such contracts; and it is distinctly understood and agreed

1. That said Party of the First Part is hereby appointed the GENERAL MANAGER and TREASURER of this Corporation, Party of the Second Part, for the term of this INDENTURE, with full power and authority to exercise, without any resolution or further authorization of the said Parties of the Second Part or any of them, each and all the powers and rights of the said Corporation Party of the Second Part, to the same extent that the said powers and rights could be exercised

by the said Corporation, its Directors, Members or Stockholders or Officers or Attorneys, which said exercise of powers the said Parties of the Second Part do and each of them does hereby ratify, adopt, approve and confirm, as their and each of their respective acts; and it is further distinctly understood and agreed that during the term of this INDENTURE, neither the Directors nor the Officers nor Stockholders of the said Corporation shall exercise, or attempt to exercise [60] any right or power inconsistent with the provisions of this INDENTURE; provided, however, and the said Party of the First Part hereby covenants that he will not interfere with the practical management or operation of the said mill so long (1) as all the payments herein provided for are made at the time and in the manner specified and all the other terms of this contract kept and performed and so long also (2) as the said mill is conducted in the ordinary course of such industries, to wit: buying logs, manufacturing the same into lumber and lumber products and selling the same, all at prices which are satisfactory to the said party of the First Part; it being the object, purpose and intent of this proviso that no additional investments or improvements of any character, such as enlarging the plant, purchase of other plants and of interests therein, constructing railways, purchase of timber lands, or the purchase of any interests in any such investments, improvements, and matters, shall be made either by contract or otherwise by the said Corporation or by its



officers or agents or any of them, or by the said Parties of the Second Part.

2. The salary of the said Party of the First Part as such said General Manager and Treasurer, shall be the sum of Two Hundred and Fifty Dollars (\$250.00) per month, payable monthly.

3. The said Party of the First Part shall be repaid and reimbursed any and all sums of money or property advanced by him at the rate of Twenty Thousand Dollars (\$20,000.00) per month, payable monthly, on the 8th day of each and every consecutive month commencing with the 8th day of April, 1918, until the same is repaid, and also interest at the rate of eight per cent (8%) per annum on all sums actually advanced by [61] him, also payable monthly; provided however, that the said Parties of the Second Part shall have the right and option at any time after January 8, 1918, to repay all of said sums and interest, and the said Part of the First Part hereby covenants that in the event of such repayments being made, including the profits hereinafter referred to, and the said Parties of the Second Part giving to him security which shall be satisfactory to him for the true and faithful performance of all the other terms and conditions of this contract, he will resign as the General Manager and Treasurer of the said Corporation Party of the Second Part.

4. In addition to all other payments to said Party of the First Part, he shall be paid in cash monthly, a further sum equal to twenty per cent (20%) of the net profits of the Corporation Party



of the Second Part, from all sources, as the same accrues and are earned during a period of Eighteen Months (18) from date hereof.

5. The said profits are to be determined after allowing for depreciation at a rate not in excess of Ten Thousand Dollars (\$10,000.00) per annum on all property, and stumpage at the rate of Five Dollars (\$5.00) per thousand.

6. When all the said payments are made and each and all the things done by the said parties of the Second Part on their part to be done and performed and in the manner herein provided for, the said Party of the First Part shall reconvey to the said Parties of the Second Part all the said property hereby conveyed to him, less the said payments hereinbefore referred to, on the said Parties of the Second Part executing to the said Party of the First Part a general release of all liability.  
[62]

7. The said Parties of the Second Part shall pass or cause to be passed all necessary resolutions of the said Board of Directors and Stockholders, Amendments to the By-Laws or Articles of Incorporation of the said Corporation Party of the Second Part to give all the provisions of this Indenture full force and effect; and in addition thereto shall pledge and cause to be pledged to the said Party of the First Part at least Twelve Hundred and Fifty Shares (1250) of the capital stock of the said Corporation Party of the Second Part, and it is distinctly understood and agreed in this respect that the said Parties of the Second

Part shall not issue, or cause or allow to be issued more than One Thousand (1000) additional such said shares without the written consent of the said Party of the First Part.

8. At the end of the period herein provided for, the said Parties of the Second Part shall make execute and deliver to the said Party of the First Part, a general release of all liability, on his rendering true and proper accounts and reports in accordance with the provisions of this agreement.

AND IT IS FURTHER HEREBY MUTUALLY UNDERSTOOD AND AGREED that time is hereby expressly declared to be of the essence of this contract; that the said Parties of the Second Part shall pay or cause to be paid into the treasury of the said Corporation Party of the Second Part, for and on account of its working capital, to be used as such, the sum of One Hundred Thousand Dollars (\$100,000.00) in cash as the same is needed but in any event not later than March 5, 1918; that any failure to pay this total sum in the manner specified shall be construed to be and understood and agreed to be a default; [63] that on any default of any nature on the part of said Parties of the Second Part or any of them, the said Party of the First Part shall at his option be relieved at law and in equity of all duty or liability to reconvey or to account, and shall be entitled to own, hold and transfer the said property as his own, free and clear of any claim or right or demand of any nature on the part of the said Parties of the Second Part or any of them; and that the provi-

sions of this Indenture shall be binding upon and its benefits accrue to the successors and assigns of the parties hereto.

MADE, EXECUTED AND DELIVERED IN DUPLICATE this 8th day of January, 1918, by the parties hereto, the said Corporation acting through its officers thereunto duly authorized.

[Seal]

Parties of the First Part:

OREGON PACIFIC MILL AND LUMBER  
COMPANY, a Corporation.

By F. DOHRMANN, Jr.,

President.

By JNO. W. McDONALD, Jr.,

Secretary.

Parties of the Second Part:

F. DOHRMANN, Jr.,

JNO. W. McDONALD, Jr.,

CHAS. W. CORBALEY,

JNO. J. O'TOOLE,

Directors of said Corporation Party of the Second  
Part.

F. DOHRMANN, Jr.,

JNO. W. McDONALD, Jr.,

CHAS. W. CORBALEY,

F. K. ECKLEY,

JNO. J. O'TOOLE,

Stockholders of the Said Corporation Party of the  
Second Part." [64]

It appearing some time in February, 1918, that the government intended to charge the Oregon Pacific Mill & Lumber Company 8% on all advances

made by the Government, Mr. Rogers agreed that he would enable the Oregon Pacific Mill & Lumber Company to dispense with the governmental loans by himself making the necessary advances to finance their operations. This arrangement did away with the necessity for any surety bond, and consequently the bond that had been given was cancelled and the \$300,000.00 in securities which Mr. Rogers for Mr. Howard had put up as indemnity was returned to Mr. Howard. The Government was paid back from moneys furnished by Mr. Rogers the money it advanced amounting to \$283,500.00, and thereafter Mr. Rogers instead of the government financed the lumber company.

To further protect Rogers in making these advances of securities and later of money, the deed and bill of sale from the Clatsop Mill Company conveying its timber lands and mill and equipment at Astoria were taken in the name of Rogers instead of the Oregon Pacific Mill & Lumber Company, and were placed in escrow in a bank in Portland. These are Defendant's Exhibits "D" (the deed) and "G" (the bill of sale) and are dated November 22, 1917. The consideration recited in the deed is \$300,000.00, and in the bill of sale \$1.00; but the actual consideration paid was \$266,587.90 for both the deed and the bill of sale. The idea was that if the Oregon Pacific Mill and Lumber Company performed its contract with Rogers, already set forth (Defendant's Exhibit "A"), Rogers would convey these properties to the Oregon Pacific Mill & Lumber Company; if not, then, having the deed



and bill of sale in his name would facilitate Rogers' enforcing his forfeiture rights under the contract. These instruments were placed in escrow pending completion of [65] payment of the purchase price, which was being paid in installments.

The men actively in charge of the operations of Oregon Pacific Mill & Lumber Company were Corbaley, Vice-President, and McDonall, Secretary. They were both at Astoria. Dohrmann was President. Rogers was Treasurer in order to protect his advances. These two were in San Francisco.

From the start operations were unsatisfactory. The Oregon Pacific Mill & Lumber Company failed to give Rogers an accounting at the end of the first month and, as they were asking for more money, Rogers on April 7th came up from San Francisco to investigate. As a result, he asked to have the books kept in his office at San Francisco and to have the vouchers sent him so that a statement could be made up showing whether the Oregon Pacific Mill & Lumber Company was making or losing money, and what its operations were. On this visit the government officers of the Spruce Production Divisions told him that the mill was not being run properly.

The Oregon-Pacific Mill & Lumber Company had defaulted in their first payment of \$20,000.00 to Rogers called for in the contract of January 8, 1918 (Defendant's Exhibit "A"), and Rogers extended the time for payment to June 1st on the understanding that if payments were not made and



conditions were not satisfactory he would cancel the contract.

When June came the company could not make its payments, and about the end of June or beginning of July, Dohrmann and Rogers came up together from San Francisco to Portland. The Oregon-Pacific Mill & Lumber Company under Corbaley and McDonald was not getting along. The Government had put in the eight-hour day and revised the rate of pay in the lumber camps and mills without making compensatory raises in the price of spruce. As a result of this July visit of Dohrmann's and Rogers', the contract of January 8, 1918 (Defendant's Exhibit "A") was modified by Rogers being given 51% of the stock in [66] the company so that he could the better take any action to protect his interests should default occur in the monthly payments to him of \$20,000.00, and he waived his right to 20% of the profits.

The stockholders of the Oregon Pacific Mill & Lumber Company never paid in the \$100,000.00 working capital insisted on by Rogers in the contract of January 8, 1918, as one of the essential conditions of his advances. Dohrmann furnished about \$40,000.00. All the rest of the money came from Rogers, and by August he had advanced \$345,000.00.

After the June-July visit of Rogers and Dohrmann, Corbaley and McDonald remained in charge and conditions got steadily worse. The Oregon Pacific Mill & Lumber Company never made any

payments for May, June, July or any further payments, and Rogers gave Dohrmann and the other stockholders until September 1st to pay up the \$100,000.00 working capital and find some means of reimbursing him. On September 1st nothing had been done toward this, and Rogers occasionally took possession of the property under his contract, and near the end of September or about the first of October, changed the name of the business and operated under his own name as a sole trader.

The minutes of a directors' meeting of the Oregon Pacific Mill & Lumber Company held September 24th (Defendant's Exhibit "E"), relating to this taking over of the property by Rogers, are as follows:

**Defendant's Exhibit "E."**

**"DIRECTORS' MEETING No. 9.  
OREGON PACIFIC MILL & LUMBER  
COMPANY.**

Held on Tuesday, September 24, 1918, at the hour of two P. M., at the office of the Company.

Present: F. Dohrmann, Jr., Clem W. Rogers, E. M. Rider. [67]

Absent: Chas. W. Corbaley, J. W. McDonald, Jr.  
Mr. F. Dohrmann Jr., President, presided.

The Secretary read the minutes of the previous meeting, held on June 3, 1918, which on motion duly seconded were approved.

The President stated that the object of this

meeting was to take official note of the following facts:

That at the end of the month of August, 1918, the contract executed between this Company and Clem W. Rogers, which said contract is spread on the Minutes of the Directors Meeting of this Company of December 8, 1917, has not been fully complied with in so far as the time or repayments of money advanced is conditional therein; and further

That, based thereupon said Clem W. Rogers had on or about the first day of September, 1918, visited the property of the mill in Astoria, Oregon, and had, at that time, by express consent of Messrs McDonald, Corbaley and Dohrmann taken full possession of the properties in accordance with the said contract under the forfeiture clause therein; and further

That, the said property now stands on the records and deeds of Clatsop County, Oregon, in the name of Clem W. Rogers, Grantee; and further

That, the results of the operations of the business up to the first of September, 1918, have been absolutely unsatisfactory to all concerned; and further

That Messrs. Corbaley and McDonald had agreed that if the results by September 1, 1918, were not satisfactory to said Clem W. Rogers, it would be the only solution to have said Clem W. Rogers take full possession of the Mill as of September 1, 1918, and operate same for his own account as specified in said [68] contract as above; and further

That, said Messrs. McDonald and Corbaley had expressed their willingness to tender their resignations if the results by September 1, 1918 continued to prove unsatisfactory to said Clem W. Rogers; and further

That Messrs. McDonald and Corbaley had tendered to the Company their resignations, said resignations being attached to and made part of these Minutes.

Thereupon, on motion of Mr. Rogers, seconded by Mr. Rider, it was unanimously

RESOLVED, That all of the foregoing actions of the giving over possession of the properties at the mill to said Clem W. Rogers be approved; that he take and hold possession of the Mill and its properties and operate the same for and on his own behalf in protection of his interests, in accordance to the contract heretofore referred to; and that the said resignations of said Messrs McDonald and Corbaley be accepted by this Board as of September 30, 1918, it having been arranged that they ceased activities as Managers on or before September 1, 1918, and that the salary for the month of September 1918, be paid to Mr. McDonald, and that the salary for the month of September, 1918, for Mr. Corbaley be credited to his own personal overdraft account as heretofore arranged between him and said Clem W. Rogers.

On motion of Mr. Rogers, seconded by Mr. Rider, it was unanimously

RESOLVED: That all of the above actions be reported at the Special Meeting of the Stock-



holders, which the President was instructed to call, to be held October 8, 1918, at the office of the Company, for the approval and ratification [69] of the Stockholders of record.

The question was considered as to the advisability of electing successors to Mr. Corbaley and Mr. McDonald, and after discussion it was decided that no immediate action is necessary and said action was further postponed in view of the fact that there still remains a quorum of the Board of Directors in the persons of Mr. Dohrmann, Mr. Rogers and Mr. Rider.

In conjunction with the taking over of the premises and properties of the mill by Mr. Rogers, on motion of Mr. Rider seconded by Mr. Rogers, and duly carried, the President was authorized to negotiate with Mr. Rogers for the sale of all the cut lumber and logs in and belonging to the Mill as of September 30, 1918, at a fair price to be established and based on an inventory as of that date, the payment therefor to be credited to the Company on its indebtedness account to said Clem W. Rogers. The President then stated that he had already negotiated with Mr. Rogers in this matter and that they had agreed, subject to the above-mentioned action of this Board, that Mr. Rogers is to buy all the cut lumber as per inventory of September 30, 1918, at a price of \$20.00 per thousand feet flat less \$2.50 in consideration of the cost of handling, and to buy all the logs in the pond at the current Government established prices, namely \$35.00 for No. 1, \$20.00 for No. 2



and \$11.00 for No. 3, plus the proportion of cost to towage of same into the pond. Both the President and Mr. Rogers expressed themselves as satisfied with these prices, and on motion of Mr. Rider seconded by Mr. Rogers, the prices and these arrangements were duly confirmed by this motion being unanimously carried.

There being no further business, the meeting on [70] motion duly seconded adjourned.

F. DOHRMANN, Jr.,

President.

CLEM W. ROGERS,

Secretary.

Approved by:

F. DOHRMANN, Jr.,

CLEM W. ROGERS,

E. M. RIDER,

Directors.

Absent: resigned,

CHAS. W. CORBALEY,

JNO. W. McDONALD, Jr."

This action by the directors was approved by the Stockholders at a meeting held October 8th at which the stock was represented as follows:

F. Dohrmann, Jr..... 276 shares

E. M. Rider..... 2 shares

Clem W. Rogers..... 924 shares

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Total .....1202 shares

Absent ..... 308 shares

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Total stock subscribed.....1510 shares

At this same stockholders' meeting the following resolution was adopted:

"Whereas, this company entered into a contract with the Government of the United States to furnish to it spruce airplane lumber, said contract being No. SPD-4 dated December 17, 1917; and

"Whereas, the company is unable to perform said contract and desires to secure the cancellation thereof, therefore [71] it is this day

RESOLVED, that Clement W. Rogers be and he is hereby authorized to cancel the said contract, such cancellation to be as of September 30, 1918."

It was further resolved at this meeting that the Oregon Pacific Mill & Lumber Company execute and deliver a deed to Rogers of the timber lands and a bill of sale of the mill and equipment, and this was done (Defendant's Exhibits "H" and "I"). The property thus conveyed to Rogers was the same as that which had been bought from the Clatsop Mill Company (deeds to which had been taken in Rogers' name) except some equipment and other property that had been sold or used up. The consideration paid by Rogers to the Oregon Pacific Mill & Lumber Company was \$246,312.15, and this was credited by him on the indebtedness of the Oregon Pacific Mill & Lumber Company to him. The Oregon Pacific Mill & Lumber Company was allowed exactly the same price which it had paid the Clatsop Mill Company for the property (\$266,587.90), less deductions for

property used up or sold off, insurance used up, depreciation, taxes and such like adjustments. These deductions left a balance of \$246,312.15 which Rogers therefore credited as aforesaid. When Rogers took over the mill he thought there would certainly be enough assets to pay all current liabilities. He was not sure about there being assets to pay himself and Dohrmann. Referring to the resolution authorizing Rogers to secure a cancellation of the company's contract with the Government (Contract SPD-4), Dohrmann was very anxious to have this cancelled, because he wanted to rid himself of any further liability for not having complied with the Government's terms. He was very anxious to have done with the whole thing. [72]

Contract SPD-4 having been cancelled and Rogers having taken possession and title to the mill and timber under his contract, and having commenced operations in his own name as sole trader, made a new contract with the Spruce Production Division for getting out spruce for the Government. This contract was SPD-261.

Rogers did not take over the entire business of the Oregon Pacific Mill & Lumber Company. He took possession and title to the mill, equipment and timber lands, as explained; he also took over the logs and lumber and allowed the Oregon Pacific Mill & Lumber Company therefor \$59,834.95. He took these logs and lumber not because he particularly wanted them, but because the lumber being already piled in the yard, he and the others

thought it would be more convenient for him to take it over to avoid getting it mixed with the lumber which he expected to produce under his new operations; he did not take over the cash, book accounts, bills receivable, or business of the Oregon Pacific Mill & Lumber Company. This amounted in round numbers to \$91,000.00. He did, however, as Secretary and Treasurer of that company liquidate the affairs of that company in so far as its assets would pay off its liabilities. These assets, however, were not sufficient to pay off all creditors in full. Besides the amount owing Brix Brothers, to recover which this suit is brought, the Oregon Pacific Mill & Lumber still owes Dohrmann \$8,262.61 and Rogers over \$31,000.00 (unless the \$60,000.00 which Rogers got from the Spruce Production Division belongs to the Oregon Pacific Mill & Lumber Company). Dohrmann has never made any claim that Rogers should reimburse him this \$8,262.61. There are, apparently, still other claims as yet unpaid. [73]

Referring to the claim which Rogers presented to the Spruce Production Division for damages, the witness said that at the first meeting he had with the Claims Board of the Spruce Production Division the Board denied any liability to the Oregon Pacific Mill & Lumber Company, giving as reason for such denial that the Oregon Pacific Mill & Lumber Company had cancelled its contract of its own free will and consequently had no claim against the government at all. The Claims Board persisted in this attitude throughout, and



never did acknowledge any liability to the Oregon Pacific Mill & Lumber Company on Contract SPD-4. The reason he presented his claim both in his own name and as assignee of the Oregon Pacific Mill & Lumber Company was that Mr. McDonald asked him to file a claim for the Oregon Pacific Mill & Lumber Company at the same time that he filed his own claim, and he told McDonald that he didn't think the Government would consider any such claim but that he would be willing to do it, and McDonald prepared the figures, such figures as he had down in San Francisco, showing their losses, and asked Rogers to present it and Rogers took it to an attorney in Portland. First when he came to Portland he went to see the Board of Claims to ask them how they wanted the claim prepared. He told them he had a claim for the Oregon Pacific Mill & Lumber Company and one for himself. They said, "Well, put all your claim together, whatever it is; let's know all about it at one time. There is no regular form. You can just make up the claim and present it." So he gave the facts to an attorney in Portland and that is the way the claim was made up. [74]

### **Testimony of C. L. Brown, for Defendant.**

C. L. BROWN testified that he was a resident of San Francisco and was in the employ of defendant Rogers the latter part of the year 1918 as manager of the mill at Astoria after Rogers took it over October 1, 1918, and that he assisted in the preparation and presentation of Rogers' claim



to the Spruce Production Claims Board and took part in the negotiations with the Board, and that the Board referring to Contract SPD-4, told him and Rogers that the Board would not consider a claim on a contract which had been previously cancelled at the request of the Oregon Pacific.

### **Order Approving Statement of Evidence.**

Due notice of the lodging in the Clerk's office of the foregoing statement having been given to counsel for appellee and counsel having made no objection, said statement is hereby approved as true, complete and properly prepared, the exhibits noted in the foregoing statement as to be set out in full printed record being deemed a part of the foregoing statement the same as if they were set out in full therein.

R. S. BEAN,  
Judge.

Dated this 25th day of July, 1922. [75]

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AND AFTERWARDS, to wit, on the 13th day of July, 1922, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [120]

### **Praecipe for Transcript of Record.**

To G. H. Marsh, Esquire, Clerk of the Above-entitled Court:

Sir:

We desire the following portions of the record and the statement of the proceedings at the trial

and of the evidence submitted herewith to be incorporated into the transcript on appeal.

1. A notation of some sort that the case was removed from the Circuit Court of the State of Oregon for Clatsop County.

2. The complaint, omitting the verification.

3. The first amended answer, omitting the verification.

4. Statement of proceedings at the trial and of the evidence herewith submitted.

5. Memorandum opinion of Judge Bean dated December 12th.

6. Decree.

7. Petition for rehearing.

8. Order denying petition (if there was one; I cannot find it in the record).

9. Notice of appeal, bond, assignments of error, and other papers showing perfection of appeal.

ERSKINE WOOD,

Of Attorneys for Defendant, Appellant.

Service accepted July 13, 1922.

CAREY & KERR,

OMAR C. SPENCER,

Solicitor for Plaintiff's Appellee. [121]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do

hereby certify that the foregoing pages numbered from three (3) to one hundred and twenty-one (121), inclusive, constitute the transcript of record upon appeal from the decree of the said District Court of the United States for the District of Oregon, in the case in said Court wherein Brix Bros. Logging Co., a Corporation, is plaintiff and appellee, and Clem W. Rogers is Defendant and appellant; that said transcript of record has been prepared by me in accordance with the praecipe for transcript filed in said cause, and that the said transcript is a full, true and correct transcript of the record proceedings had in said court in said cause, which the said praecipe directed to be included therein, as the same appear of record and on file at my office and in my custody. And I further certify that I return to the United States Circuit Court of Appeals with the said transcript of record attached, the original citation in said cause.

And I further certify that the cost of the foregoing transcript is \$33.65, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Portland in said District this 22d day of August, 1922.

[Seal]

G. H. MARSH,  
Clerk. [122]

[Endorsed]: No 3923. United States Circuit Court of Appeals for the Ninth Circuit. Clem Rogers, Appellant, vs. Brix Bros. Logging Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed September 11, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the District Court of the United States for the  
District of Oregon.

IN EQUITY.

BRIX BROS. LOGGING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

CLEM ROGERS,

Defendant.

**Order Extending Time to and Including September  
20, 1922, to File Record and Docket Cause.**

Upon motion of Clem Rogers, the appellant herein, appearing by his attorneys, Wood, Montague & Matthiessen, and for good cause shown,—

IT IS HEREBY ORDERED that the time for filing the record and transcript on appeal herein and docketing the case with the clerk of the United

States Circuit Court of Appeals for the Ninth District be and the same hereby is enlarged and extended to and including the 20th day of September, 1922.

Dated this 24th day of July, 1922.

R. S. BEAN,  
District Judge.

O. K.—CAREY & KERR.

[Endorsed]: In the District Court of the United States for the District of Oregon in Equity. Brix Bros. Logging Company, a Corporation, Plaintiff, vs. Clem Rogers, Defendant. Order Enlarging Time to File Transcript on Appeal.

No. 3923. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including September 20, 1922, to File Record and Docket Cause. Filed Jul. 26, 1922. F. D. Monckton, Clerk. Refiled Sept. 11, 1922. F. D. Monckton, Clerk.



# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

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CLEM ROGERS,  
*Appellant,*

*vs.*

BRIX BROS. LOGGING COMPANY,  
a Corporation,  
*Appellee.*

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## Brief for the Appellant

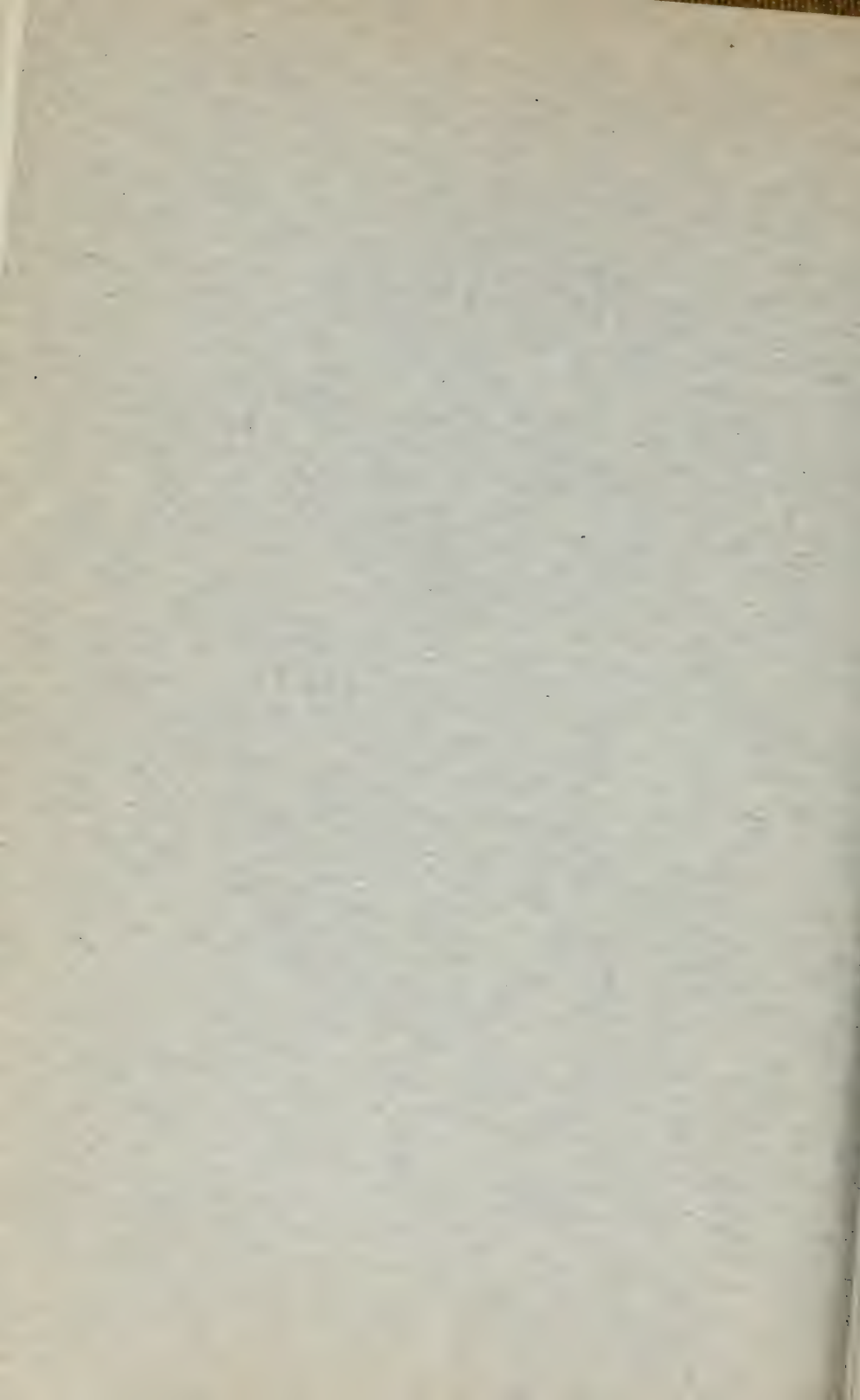
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*Upon Appeal from the United States District Court  
for the District of Oregon.*

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# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

---

CLEM ROGERS,  
*Appellant,*

*vs.*

BRIX BROS. LOGGING COMPANY,  
a Corporation,  
*Appellee.*

---

### Brief for the Appellant

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*Upon Appeal from the United States District Court  
for the District of Oregon.*

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### STATEMENT OF THE CASE

The case, stripped to its essentials, is this : Oregon Pacific Mill and Lumber Company, a Nevada corporation, was organized November 28, 1917, to cut airplane spruce in Clatsop County, Oregon, for the Government during the war. On December 22, 1917, this corporation made a contract with the Spruce Production Division of the Army to deliver ten million feet of airplane spruce at the rate of 560,000 feet a month, at a price of \$105.00 a thousand feet. This contract is known in this case as S. P. D.-4. It contemplated 18 months operations, the monthly rate of 560,000 feet, cutting out the full ten million feet in that period and bringing the contract to an end June

30, <sup>1919</sup>~~1918~~. To carry out this contract the corporation bought from the Clatsop Mill Company a sawmill at Astoria and certain spruce timber lands. In order to finance its operations, the corporation borrowed from defendant Clem Rogers from time to time various sums totaling \$345,000.00. To protect himself in making these advances defendant Rogers on January 8, 1918, made a written contract with Oregon Pacific Mill and Lumber Company, the borrower, in substance as follows :

(1) The corporation conveyed and assigned to Rogers all of its property including the sawmill at Astoria, timber lands, and "in particular all contracts with the Government of the United States, and all interest arising under such contracts" as security for the loans.

(2) Rogers was made general manager and treasurer of the corporation, with a proviso that he would keep his hands off as long as his loans were repaid him in instalments as agreed and the business run satisfactorily.

(3) The corporation was to repay him in instalments of \$20,000.00 a month with 8% interest, and was to pay him 20% of the net profits. (He later gave up his claim to the profits in consideration for 1251 shares of the capital stock.)

(4) The corporation was to pledge to him 1250 shares of the capital stock ; and

(5) The stockholders agreed to pay into the treasury for working capital the sum of \$100,000.00 not later than March 5, 1918. (Record, pp. 116-123.)

Rogers carried out his part of this contract and made the advances totaling \$345,000.00, but the Oregon Pacific Mill and Lumber Company did not carry out its part; it did not repay the instalments as agreed, nor put up the \$100,000.00 working capital. The sawmilling operations of the corporation were in charge of two gentlemen named Corbaley and McDonald. These men were incompetent and the operations were thoroughly unsatisfactory to Rogers and to the Spruce Production Division of the Army, which was not getting airplane spruce deliveries under the contract in the quantities specified. A Mr. Dohrman, president of the company, and Rogers, its "angel," lived in San Francisco. They made trips to Portland to investigate, and, if possible, improve conditions, and Rogers, who was getting exasperated at the non-payment of his loans and the failure of the stockholders to put up the agreed working capital, threatened to take over the property, but was mollified by promises of improvement, which did not materialize. Things went from bad to worse. The government was dissatisfied, and Dohrman feared that he or his company might be held legally liable for their failure to perform the Spruce Production contract; Rogers was thoroughly dissatisfied with the way things had gone; and therefore, with the consent of everybody, Rogers



exercised his rights under the contract of January 8, 1918, and took over as actual owner the sawmill and timber lands of the Oregon Pacific Mill and Lumber Company and allowed the company therefor a credit of \$246,312.15, which was, with certain appropriate deductions, the same amount that the Oregon Pacific Mill and Lumber Company had paid for these properties out of the moneys Rogers had advanced to it. Rogers also at this same time bought the company's lumber stock in the sawmill yard allowing them a credit therefor of \$59,834.95, which events proved to be quite an excessive price. All of this was authorized by a directors' meeting of the Oregon Pacific Mill and Lumber Company of September 24, 1918, and ratified by a stockholders' meeting of October 18, 1918. Rogers seems to have gone into actual possession about October 1, 1918. In taking over these properties he did not take over the whole business of the Oregon Pacific Mill and Lumber Company; he did not take over the cash, the book accounts, or the bills receivable, amounting in round numbers to \$91,000.00. He did, however, as secretary and treasurer of that company, liquidate the company's affairs in so far as its assets would pay off its liabilities. These assets were, however, not sufficient to pay off all creditors in full, although he had expected them to be sufficient to pay everybody except himself and Dohrman. As it was, however, Brix Bros. Logging Company, this plaintiff, one of the creditors, was unpaid to the extent of fourteen thousand odd dollars, Dohrman was unpaid to the extent of over

\$8,000.00, and Rogers was unpaid to the extent of over \$31,000.00.

When Rogers took over these properties, as has been described, he operated them as sole trader under the name of Clatsop County Lumber Company. At the earnest solicitation of Dohrman (Record, p. 133), and, being especially authorized thereunto by the stockholders' meeting of October 8th (p. 132), Rogers secured the cancellation by the Spruce Production Division of the Oregon Pacific Mill and Lumber Company's contract No. SPD-4 (p. 114). He then made a new contract in his own name with the Spruce Production Division to furnish 6,200,000 feet of airplane spruce lumber at prices set forth in the contract (pp. 107-115). This contract is known as SPD-261. It was to run for the unexpired term of the old contract, expiring, as the old one would have, on June 30, ~~1918~~; 1919; and apparently the 6,200,000 feet was the amount undelivered under the old contract, though this does not definitely appear. This contract did not carry a cancellation clause allowing the government to cancel at will. Rogers proceeded to install a new manager, Mr. Brown, at the mill in place of Corbaley and McDonald, who had got out, and began to operate under his contract at a profit—his profit for the one month and twelve days that he operated up to the time of the armistice being \$8,053.50, as contrasted with a net profit of \$19,691.02 for the previous ten months' operation by the Oregon Pacific Mill and Lumber Company (p. 69. See, also, the findings of

the Contract Board of the Spruce Production Corporation, p. 101).

When the armistice came Rogers' contract SPD-261 was canceled by the Government and he was requested to present his claims to the Contract Board of the Spruce Production Corporation (successor to the Spruce Production Division). He did so in the form shown in Plaintiff's Exhibit 2 (pp. 47-50), which claim was evidently supported by Plaintiff's Exhibits 3, 4 and 5 (pp. 50-88). The claim as thus presented was a combined claim of Rogers as assignee of the Oregon Pacific Mill and Lumber Company and of Rogers in his own right; and he has explained that he presented it in this form at the request of the Spruce Production Division itself (p. 135); which is borne out in the opening statement of the claim that "the claim *in this form* is presented at the request of the United States Spruce Production Corporation as a basis of settlement, and the claimant reserves all legal rights." (p. 47.) Rogers presented the claim as assignee of the Oregon Pacific Mill and Lumber Company in so far as contract SPD-4 went, and in his own right in respect to contract SPD-261.

The Contract Board of the Spruce Production Corporation, (so Rogers and Brown both testified, pp. 134-136, and their testimony is nowhere contradicted), refused to listen to any claim whatever based on contract SPD-4 because that contract had been canceled at the special request of Rogers' assignor, the Oregon Pacific Mill and Lumber Com-

pany. Rogers, after some negotiation with the Board, finally agreed to accept \$60,000.00 in settlement of his claim, and to sign a full release. The Contract Board made findings embodying the result of its deliberations (Plaintiff's Exhibit 7, p. 99), and the release signed by Rogers is Plaintiff's Exhibit No. 9 (p. 105). Rogers has always considered that this \$60,000.00 belonged to him as damages for the cancellation of his contract SPD-261, and has treated the money accordingly. The Oregon Pacific Mill and Lumber Company has never made any claim for any part of this money.

The plaintiff in this case, Brix Bros. Logging Company, having sold logs to the Oregon Pacific Mill and Lumber Company during the days of its operations, and not having been paid in full for such logs, brought an action at law in the circuit court of the State of Oregon for Clatsop County against the Oregon Pacific Mill and Lumber Company in which it obtained a judgment by default in the sum of \$15,864.97 and \$22.50 costs. On this judgment the sum of \$1,133.46 was paid, leaving unpaid thereon \$14,754.01, with interest at the rate of 6% per annum from August 29, 1919, until paid.

The sheriff of Clatsop County making return that he was unable to find any property of the Oregon Pacific Mill and Lumber Company to seize in satisfaction of this judgment, the plaintiff Brix. Bros. Logging Company brought this suit in equity against Clem Rogers on the theory that he had improperly appropriated assets of the Oregon Pacific Mill and



Lumber Company to himself, and asking for an accounting, and that the assignments and transfers of the property of the Oregon Pacific Mill and Lumber Company to him be set aside as fraudulent, and that he be decreed to pay the plaintiff the amount of its said judgment.

The case has resolved itself into this issue of fact—does the \$60,000.00 awarded by the Spruce Production Division in settlement of Rogers' claims belong to him or the Oregon Pacific Mill and Lumber Company, or if it belongs to both of them, in what proportion should it be divided? We contend it all belongs to Rogers. Appellee apparently contends that at least enough of it belongs to the Oregon Pacific Mill and Lumber Company to warrant plaintiff as a creditor of that company having its judgment paid out of such moneys. It will have to be borne in mind all the time that even if it be considered that the full \$60,000.00 was awarded, contrary to our contention, for cancellation of contract SPD-4, nevertheless \$31,000.00 of it would have to go to Rogers before any creditors of the Oregon Pacific Mill and Lumber Company could participate; because that amount was still owing from the Oregon Pacific Mill and Lumber Company to Rogers and was secured to him by the Oregon Pacific Mill and Lumber Company assigning to him all its rights and interests in Government contracts. This assignment, you will remember, was made in the contract of January 8, 1918, already referred to and was one of the considerations for Rogers' advances. So that, even under any theory of



the case most adverse to us, there is only \$29,000.00 left to dispute about, and the question is—Is the plaintiff entitled to any portion of this sum?

In its first amended answer defendant suggested that the bill of complaint was defective because it failed to join Oregon Pacific Mill and Lumber Company as a party defendant (p. 16), and again made the same objection in open court before the case proceeded to trial (p. 46). The court overruled the objection, proceeded to hear the evidence, and gave a decree in favor of the plaintiff. The court's opinion says: "The question for decision is whether the defendant should be allowed to retain and apply to his own use the amount received by him from the Government over and above that due him from the corporation, or whether it shall be applied on plaintiff's judgment," and makes no attempt whatever to apportion the \$60,000.00 between contracts SPD-4 and SPD-261. The court was evidently of the opinion that even if \$31,000.00 of the \$60,000.00 be considered as awarded for contract SPD-4, and in turn paid over to Rogers on account of his secured advances, there was still enough additional of the \$60,000.00 awarded for contract SPD-4 to warrant paying plaintiff's judgment out of this additional amount. All of which seems to us the very plainest error. In our view, the whole \$60,000.00 belongs to Rogers as an individual, and the Oregon Pacific Mill and Lumber Company still owes him \$31,000.00, and the plaintiff with its judgment is merely unfortunate.

Defendant petitioned the lower court for a rehearing, and offered to produce Cameron Squires, a member of the Contract Board, and himself the writer of the Board's findings on Rogers' claim, who would testify that the board in awarding \$60,000.00 had intended the full sum to go to Rogers in his own right. This petition the court denied.

### **SPECIFICATIONS OF ERROR**

#### **I.**

The court erred in finding that any part of the \$60,000.00 paid by the Spruce Production Corporation to Rogers in return for his release belonged to Oregon Pacific Mill and Lumber Company.

#### **II.**

The court erred in holding that any part of the \$60,000.00 so awarded could be appropriated to the satisfaction of plaintiff's judgment against the Oregon Pacific Mill and Lumber Company.

#### **III.**

The court erred in holding, in effect, that none of said \$60,000.00 was awarded to Rogers in his own right for cancellation of contract SPD-261.

#### **IV.**

The court erred in overruling defendant's objection that Oregon Pacific Mill and Lumber Company was a necessary and indispensable party defendant in this suit.

The court erred in entering a decree in favor of plaintiff and against defendant.

### **ARGUMENT**

#### **On the Facts**

The case does not require much argument ; merely to state it is to argue it. I really feel, however, that an overconfidence in the outcome of the trial resulted in an imperfect presentation of the case to Judge Bean. Things seemed so evident to me that they were not pressed upon Judge Bean as vigorously as they might have been, which was hardly fair to him. I do not intend to be guilty of the same mistake with your Honors, and therefore will make this argument, but try to keep it brief.

**Contract SPD-4 had been Voluntarily Cancelled at the Request of the Oregon Pacific Mill and Lumber Company.**

This fact alone is, it seems to me, sufficient to destroy the theory that any part of the \$60,000.00 awarded by the Spruce Production Corporation in settlement of Rogers' claims could be apportioned to this contract. Your Honors will remember that Mr. Dohrman, president of the Oregon Pacific Mill and Lumber Company, had been nervous about the possibility of the Government trying to hold him or his company liable for their failures under the contract. He therefore asked Rogers when Rogers was preparing to take over the property, to get the Government to cancel that contract, and the Oregon Pacific Mill

and Lumber Company itself made the same request. The Spruce Production officers, disgusted with McDonald and Corbaley's conduct of operations, were willing enough to cancel the contract and to make a new contract with Rogers himself, rightly thinking that he was a more reliable man with whom to deal and that they could expect deliveries from him under his new contract. And so the new contract SPD-261 contained a clause canceling contract SPD-4 (Record, p. 114). The cancellation was effective as of September 30, 1918.

The only claims that the Contract Board was considering were claims arising out of the cancellation by the Government, due to the armistice, of *existing* contracts. It is, therefore, frankly inconceivable to me how the Contract Board could have awarded any part of the \$60,000.00 for the cancellation of contract SPD-4, which had been voluntarily cancelled a month and twelve days before the armistice *at the request of the assignor of the party making the claim*. It seems to me that the Government officials would have been derelict in their duty to have allowed a single penny on that contract. And the record here is conclusive that they took this same view of it. Both Rogers and Brown testified that the Contract Board refused to listen to any claim based on contract SPD-4 because it had been voluntarily cancelled at the request of the other party, and their testimony is uncontradicted (pp. 134-135). This is further corroborated by the findings of the Contract Board itself



(Plaintiff's Exhibit No. 7, Record p. 99), wherein, on pages 101 to 103, the Board says, in substance, that it cannot consider a claim based on the first contract because that had been an unprofitable and losing contract under the mismanagement of Mr. Corbaley; but that the Board recognized that under the second contract the mill was producing lumber at a profit due to the efficient management of the new manager, Mr. Brown, and that this contract did not have a cancellation clause attached, and therefore Rogers' claim under it would have to be considered (p. 101). For the convenience of the court I here set out the language I refer to.

“The Board does not recognize the entire claim of Mr. Rogers because of the fact that his mill was operating at a loss while under the direction of Mr. Corbaley and the Board cannot consistently recommend consideration of repayment of losses sustained by reason of one individual permitting his affairs to be managed by another individual, when the second individual through his own negligence causes such losses. On the other hand, the Board recognizes the fact that there is still an open contract for the delivery of 4,400,000 feet of airplane spruce lumber without a cancellation clause attached and upon which claimant can rest his claim, especially in view of the fact that during the last couple of months the operation of this mill under the new manager, Mr. Brown, it is evident that the mill was producing lumber at a profit.”



I do not know how you could have stronger evidence from the Board itself as to what contract they were making an award on. They say they do “not recognize the *entire* claim of Mr. Rogers” because under the first contract he was losing money and it was his own fault because the loss was due to his inefficient manager, Corbaley. But “on the other hand, the Board recognizes the fact that there is *still an open contract* for the delivery of 4,400,000 feet of airplane spruce lumber *without a cancellation clause attached* and upon which *claimant can rest his claim*,” especially in view of the fact that under the new contract and new management the mill was showing a profit. It was plain that the Board thought that it was only on the new contract SPD-261 that Rogers could “*rest his claim*.”

The computation which the Board made showing a net loss of \$48,720.00 (par. 6 of their findings, pp. 102-103), shows the same thing—that they were awarding on the second contract only; but I reserve for a moment further explanation of this in order to first comment on a portion of Judge Bean’s opinion.

#### Judge Bean’s Opinion

Judge Bean says, in part (Record, pp. 18-19) :

“The question for decision is whether the defendant shall be allowed to retain and apply to his own use the amount received by him from the Government over and above that due him from the corporation, or whether it shall be applied on plaintiff’s judgment.

“For the defendant the contention is that the payment made to him by the Government was for damages which he alone suffered by reason of the cancellation of the contract of October 8, 1918. But that contract was, in effect, a mere substitution for, or continuation of the former contract with the corporation because he had succeeded to the rights, obligations and property of the corporation, and was conducting the business formerly engaged in by it. It called for deliveries within the period prescribed in the original contract and in the same quantities monthly. The aggregate amount to be delivered is probably (although there is no evidence on that point) the quantity remaining undelivered by the corporation.

“The claim for damages as presented to the Government by the defendant, although made in his own right and as assignee of the corporation, supports this theory. It is based entirely upon the original contract with the Government, the financial transactions of the corporation and its dealings with the Government and claims reimbursement on account thereof. The second contract is not mentioned or referred to therein.” (This last sentence is erroneous.)

“The statement submitted in support of the claim is to the same effect, and the principal evidence offered is a report of certified accountants made up from the books and accounts of the corporation. It is upon this theory that the claim

was considered and allowed by the Contract Board of the Spruce Production Corporation, which in its findings recites the history of the transactions from the making of the contract with the corporation in December, 1917, to the refusal of the Government to accept further deliveries, and based thereon recommended the allowance.

“I conclude, therefore, that plaintiff is entitled to the relief as prayed for and decree may be prepared accordingly.”

Now, even on Judge Bean's theory, as expressed in this opinion, Rogers alone is entitled to all the money. As a matter of fact, even if the second contract was, as Judge Bean says, a mere substitution for the first contract, it was nevertheless legally a new and separate contract, and the only contract on which Rogers could “rest his claim.” In the language of the release executed by Rogers and drafted by the Spruce Production attorneys, it had “superseded” contract No. SPD-4. But be this as it may, it is not very material. For, even accepting Judge Bean's theory that the second contract was a mere substitution for, or a continuation of the first, still all the money would go to Rogers. To prove that I am right, I ask your Honors to study carefully paragraph 6 of the Contract Board's findings (Record, pp. 102-103). Here it is:

“The Board in attempting to arrive at a basis of settlement which does not include the consideration of estimated profits, but which would

seem fair and acceptable to the claimant as well as the Division, has made computation as follows :

|                           |              |
|---------------------------|--------------|
| Original investment ..... | \$278,000.00 |
| Improvements .....        | 60,000.00    |
|                           | <hr/>        |
|                           | \$338,000.00 |

“(On account of the fact that the contract should have been 56% completed, there should have been written off 56% of \$338,000.00, leaving a balance to be assumed as a portion of this claim.)

|                         |              |
|-------------------------|--------------|
| To be claimed.....      | \$148,720.00 |
| Less salvage value..... | 100,000.00   |
|                         | <hr/>        |

NET LOSS.....\$ 48,720.00”

In this computation the Board is considering the operation under the two contracts as one. When it says that “on account of the fact that the contract should have been 56% completed,” etc., it uses the words “the contract” to cover the whole 18 months’ operation. The “56%” is the equivalent of ten-eightheenths. Why ten-eightheenths? Because the original contract was to have run for 18 months. It was dated December 22, 1917, but operations under it were to commence January 1, 1918 (Record, p. 90), and at the rate of cut specified—560,000 feet a month until ten million feet were delivered—would have expired June 30, 1919, a period of 18 months. The second contract, SPD-261, took up the operations

where the first contract left off, October 1, 1918 (p. 114), and was to run for the unexpired time of the first contract, namely, to June 30, 1919. (Record, p. 108). In short, viewing both contracts as one operation, that operation would have terminated at the end of 18 months, and at that time the sum invested in the sawmill and timber properties, etc., namely, \$338,000.00, would have been amortized. But this amortization period was cut short by the armistice. Only ten months of it had run, namely, nine months, or until September 30, 1918, under contract SPD-4, and one more month—October—and a few days in November, under contract SPD-261. Therefore, the Board said that if operations had been properly conducted, ten-eighteenths of the amortization would have taken place, leaving only eight-eighteenths which the Board could consider as a valid claim. This is what the Board means when it says in the findings, “(On account of the fact that the contract should have been 56% completed, there should have been written off 56% of \$338,000.00, leaving a balance to be assumed as a portion of this claim.)

|                         |              |
|-------------------------|--------------|
| To be claimed.....      | \$148,720.00 |
| Less salvage value..... | 100,000.00   |

---

NET LOSS.....\$ 48,720.00”

In short, ten-eighteenths equal 55 $\frac{5}{8}$ %, which the Board for convenience called 56%, and 56% of the investment of \$338,000.00 the Board considered should have been amortized in the ten months’ opera-



tions, and therefore could not be considered. But there remained 44% which could be considered, and 44% is exactly \$148,720.00—the figure that the Board arrived at and from which it then deducted the salvage value, leaving a net loss of \$48,720.00. From this it is as plain as day that the Contract Board considered that the Oregon Pacific Mill and Lumber Company in the nine months' operation it had had under contract SPD-4 had wasted its opportunities to amortize its investment at a monthly rate which would make the amortization complete at the end of eighteen months, when the contract would have expired. And it is equally plain that the Contract Board considered that Rogers in the eight months of operation yet remaining to him under his new contract SPD-261 should have had the right to amortize his investment at this same monthly rate; and since he was being deprived of this opportunity by the cancellation of the contract consequent on the armistice, he should be made an allowance, to the extent of this amortization which he was being deprived of.

Remember that from the first of these operations until the end of them, it was Rogers' money which was financing them. First it was his money in the shape of advances; later it was his money in the shape of an actual investment. For, when he took over the properties about October 1, 1918, he allowed the Oregon Pacific Mill and Lumber Company proper credits for the value of the property and his money heretofore sunk in the venture as advances became invested. And it was to give him a little of this back

that the Board made its award. Incidentally, it may be remarked here that the only working capital ever provided by the stockholders of the Oregon Pacific Mill and Lumber Company amounted to about \$40,000.00. All the rest of the money was Rogers. (Record, p. 126.)

Judge Bean, in the portion of his opinion quoted, mentions the fact that Rogers' claim and the statements submitted in support of it proceed on the theory that the second contract was a mere substitution of the first and the whole operation was one transaction. Frankly, in view of what I have written above, I cannot see what particular bearing this has on the case. However the claim was presented, the Contract Board made it plain that they were objecting to any claim on the first contract and Rogers accepted the \$60,000.00 in settlement with the clear understanding that it was all for himself on the second contract. If, however, the manner in which the claim was presented has any bearing on the case at all, it is just as well to remember that the claim was presented in that form at the request of the Spruce Production Corporation which, very properly, wanted to get every conceivable claim before it. (Record, p. 135 and p. 47, where this fact is stated in the claim itself.)

As to the auditor's statement in support of the claim, this was filed by Rogers at the request of McDonald. (P. 135.) Note that the total claim as filed was for \$193,891.21. (Record, p. 50.) But this

sum was cut down when the Contract Board discarded all claims on the first contract.

It is true, of course, that the final paragraph in the Contract Board's findings recommends that Rogers be reimbursed in the sum of \$60,000.00 in full and final settlement of all claims growing out of "cancellation of contracts SPD-4 and SPD-261, it being understood and agreed that this settlement covers all claims of claimant Clem Rogers, the Oregon Pacific Mill and Lumber Company and the Clatsop County Lumber Company." It is also true that the waiver or acceptance of the Board's award which Rogers signed (Record, p. 104), says that he agrees to accept the \$60,000.00 in full satisfaction of all claims "in any way growing out of our contracts SPD-4 and SPD-261, or as represented by our claim No. 44, heretofore filed with the Contract Board." Likewise, it is true that the release (Record, p. 105) mentions both contracts, and, on page 106, specifically releases all claims "growing out of or based on the above mentioned contract No. SPD-261 and No. SPD-4, or otherwise." But all of this is merely the usual precautionary language of an attorney who, in effecting a settlement, embraces all possible claims under it. These papers were all drafted by the Spruce Production Corporation lawyers, and since Rogers had presented a claim on both contracts, it was, of course, eminently proper that the lawyers should use language showing that he released all claims under both contracts. But this does not mean that any of the money was paid to him for account of the Oregon Pacific Mill and Lumber

Company on contract SPD-4. In fact, in the release the same caution to embrace all possible claims is evidenced throughout, where the release says (p. 106), that Rogers "releases the United States and the said United States Spruce Production Corporation from all liability, claim or demand whatsoever which said contractor may have or claim to have, whether now existing or hereinafter arising, growing out of the aforesaid contract or its cancellation or in any manner based thereon, as well as all claims or demands of every kind and character whatsoever arising out of or in connection with any operations of the contractor or dealings of any kind had between the contractor and the Government or the United States Spruce Production Corporation, or either of them, and its or their officers, agents or representatives." In short, Rogers, like any poor devil begging a settlement at the hands of the Government, was ready to release his rights to Paradise, but he was only being paid for one thing—his own losses in the cancellation of Contract SPD-261. The release, for all its all-embracing character, makes it pretty plain which contract was especially being considered. It starts out (p. 105), that whereas Rogers, sole trader, etc., heretofore entered into a contract, "said contract being No. SPD-261 *superseding* Contract SPD-4;" and whereas, the Government has canceled "said contract"; and whereas, the contractor claims certain damages by reason of "such cancellation": and "Whereas, said Contract Board has allowed said claim in the sum of \$60,000.00, and the contractor has



agreed to accept said award in full settlement and satisfaction of all claims or rights against either the Government or said United States Spruce Production Corporation, arising out of *said contract*." Then comes the releasing part already commented on.

Neither the Oregon Pacific Mill and Lumber Company, nor Mr. Dohrman, its President, and himself a Creditor of the Company, has ever made any Claim to any Portion of the \$60,000.00.

I ask your Honors to consider the rather extraordinary procedure that was had in this case. Even if Rogers had got any money in this award which did not belong to him, it would not have been money belonging to this plaintiff; it would have been money belonging to the Oregon Pacific Mill and Lumber Company, of which company this plaintiff is merely a creditor. That the Oregon Pacific Mill and Lumber Company has never made the slightest demand on Rogers for any part of this money; that Mr. Dohrman, to whom the company still owes over \$8,000.00, has never made any demand on Mr. Rogers for any part of this money; is pretty good evidence that certainly neither the company nor its officers ever considered that they had any right to a single penny of it. Yet Judge Bean has allowed a mere creditor—not even a preferred creditor—to come in, and, without even going through the formality of first asking the Oregon Pacific Mill and Lumber Company to sue Rogers, sue him and get a decree against him on the theory that part of this \$60,000.00 should have gone to the Oregon Pacific Mill and Lumber Company, which, be it noted again, has never claimed any right



to it. I think it as extraordinary a procedure as a court has ever indulged in. For, even if part of this money did belong to the Oregon Pacific Mill and Lumber Company, why should this plaintiff, Brix Bros. Logging Company, be preferred to any other creditor? There are still numerous other creditors of this company who have never been paid. If Rogers has got some money which belongs to this company and should be distributed among its creditors, they at least ought to be called into court by some general creditors' suit against the corporation and the amount pro rated among them.

Even if it could be considered that some Portion of the \$60,000.00 belonged to the Oregon Pacific Mill and Lumber Company by virtue of its Contract SPD-4, there is not a scintilla of evidence in the Record on which Judge Bean or this Court could make such Apportionment.

It is elementary that a plaintiff must prove his case. He can't ask a court to guess. And yet that is just what has been done in this suit. Without one iota of evidence before him as to how much, if any, of the \$60,000.00 belonged to the Oregon Pacific Mill and Lumber Company, Judge Bean has decided that Rogers shall pay fifteen thousand-odd dollars of it to plaintiff.

In considering this point, it must be remembered, as I pointed out in the opening statement, that by the contract of January 8, 1918 (Defendant's Exhibit A, p. 116), the Oregon Pacific Mill and Lumber Company had assigned to Rogers as security for the advances which he was to make, "all contracts, rights, leases, titles and interest of every kind and character

and in particular all contracts with the Government of the United States, and all interests arising under such contracts." This, of course, included all rights to any moneys accruing under contract SPD-4, (which had already been executed). The company still owed Rogers at the time the Contract Board awarded the \$60,000.00 (and, in fact, still owes him today), \$31,000.00. (Record, p. 134.) So that, even if \$31,000.00 of the \$60,000.00 be considered as awarded on SPD-4, it is still the property of Rogers, because of the said assignment to him of all rights under that contract as security for his advances. This, therefore, leaves only \$29,000.00 about which there can be any possible dispute. Judge Bean himself recognized this. (See his opinion, p. 18, where he says that the question for decision is whether the defendant shall be allowed to retain the amount received by him from the Government "over and above that due him from the corporation.")

Now, you can search the record in this case from cover to cover and you will not find the slightest evidence on which Judge Bean could say that \$15,000.00 of this \$29,000.00 should be apportioned to contract SPD-4 and so paid to plaintiff. In fact, the evidence is so strong that none of it should go to the plaintiff that I can only feel that I did not present the case properly to Judge Bean. Of course, as my argument up to this point shows, I think it is undoubted that all of the \$60,000.00 should go to Rogers, solely by virtue of contract SPD-261, and the corporation still owes him \$31,000.00. But suppose you guess at it—

and to guess is all you can do—and say that \$31,000.00 of it should go to contract SPD-4. Very well, this is Rogers' by virtue of the assignment, and wipes out the corporation's debt to Rogers. But having thus awarded *more than half* of the \$60,000.00 to the *unprofitable canceled* contract SPD-4, can you further bite into the \$29,000.00 guessed at as belonging to the *profitable uncanceled* contract SPD-261? Is not your guess already far too little in allowing the \$29,000.00 to the profitable uncanceled contract?

Furthermore, there is this to be noticed. The Contract Board first offered Rogers \$48,720.00 (Record, p. 103), as already explained. This Rogers refused, and the Board then increased its offer by \$11,280.00, making the total \$60,000.00. The Board, as explained in its findings (pp. 101-103), felt justified in adding this \$11,280.00 to its original offer because of the fact that the Board felt that the \$100,000.00 salvage value considered in its computations was a "debatable" item, for the reason that the spruce timber tract of the Oregon Pacific Mill and Lumber Company had been commandeered by the Government and selective logging had there been carried on by Grant Smith-Porter Brothers under Government instructions, which had gutted this timber of its best trees and had not left a good commercial logging "show." In short, this \$11,280.00 was added because of the damage thus done to the timber. But remember that Rogers had become the actual owner of both the sawmill and the timber, taking them over at the full purchase price which the Oregon Pacific Mill and

Lumber Company had originally paid for them (with appropriate deductions for property used up or sold off, insurance used up and taxes, and such like adjustments. Record, p. 133). So that Rogers, as the owner of this timber, was clearly the one entitled to any sum paid for damaging the timber. And since Rogers is the only possible rightful owner of this \$11,280.00, the logical conclusion is that this sum must be deducted from the \$29,000.00, leaving only \$17,720.00 about which there can be any possible dispute. Surely that is a small enough sum (if any apportionment at all is to be made) to guess at as being attributable to contract SPD-261. But Judge Bean thought otherwise. For the process of elimination which I have gone through shows that it is only out of this \$17,720.00 that Judge Bean could have given the plaintiff the \$15,000.00 which he did give him.

To put it another way, Judge Bean in order to arrive at his decision, had to go through the following process of reasoning: \$31,000.00 was awarded on contract SPD-4, but this belongs to Rogers by virtue of the assignment. In addition to this, however, there was at least \$15,000.00 more awarded on contract SPD-4, and this can go to plaintiff. In short, Judge Bean decided that at least \$46,000.00 out of the \$60,000.00 should be apportioned to SPD-4. I have such a high regard for his ability as a judge that I can only feel that it must have been my fault in presenting the case carelessly.



### ERROR IN JUDGE BEAN'S OPINION

Judge Bean (p. 19), speaking of Rogers' claim before the Contract Board, says: "The second contract is not mentioned or referred to therein." This is a palpable error, as a reading of the claim (Plaintiff's Exhibit 2) will show. The very first words of the claim are that Rogers presents it "*in his own right and as assignee* of the rights of the Oregon Pacific Mill and Lumber Company for reimbursement for damages suffered by reason of the breach and cancellation by the United States of *its contract* with claimant." Of course, he would not be presenting his claim "in his own right" unless he was talking about his own contract; nor would he have presented a claim for "cancellation" if he had not been talking about his own contract; and of course the words "its contract with claimant" refer to SPD-261.

### ERRORS IN THE RECORD

(1) In the Index, page ii, the words "Plaintiff's Exhibit No. 9—Contract of C. W. Rogers for Sale and Delivery to the Government of Spruce Lumber, p. 105" are in error. The document set out at page 105 is Rogers' release.

(2) Pages 74 and 75 of the Record are plain error, the pages having evidently been transposed in some manner.

(3) On page 127, sixth line, the word "occasionally" should be "accordingly."



### ARGUMENT ON THE LAW

This suit has several aspects. If it be considered a suit on the part of a creditor to recover funds misappropriated by an officer or director of the corporation, then the complaint is defective in three particulars.

In the first place, it is the defendant's contention that the Oregon Pacific Mill and Lumber Company is and was an indispensable party to the suit for these reasons: If any money was misappropriated by Mr. Rogers, that misappropriation was primarily a breach of his duty as an officer and director of the corporation and made him liable to it therefor. In justice to the defendant, when he had raised the objection in his answer, as was done here, the corporation should have been joined as a party defendant, in order that it too might be precluded by the suit instituted by the creditor from subjecting the defendant to further litigation upon the same claim. If, moreover, funds of the company were thus misappropriated, then the company very properly might be interested in seeing that the funds, if any, so misappropriated be distributed ratably among all its creditors.

In the case of *Cunningham v. Pell*, 5 Paige, 607, the plaintiff, a judgment creditor of the corporation, brought suit against its directors alone to recover from them the amount due upon his judgment, on the ground that they had misappropriated funds of the company.

Chancellor Walworth held that the demurrer to the complaint should be sustained, saying at page 613:

“But it is a fatal objection to all the relief claimed by this bill, that the corporation is not made a party. This question was decided in the case of *Robinson v. Smith*, before referred to. Although that suit was brought by the stockholders, and this by a creditor of the corporation, the principle is the same in both cases. If this creditor could compel the defendants to account to him for the funds of the bank which have been abstracted by the Pells, the corporation, if in existence, might hereafter compel the defendants to account a second time to it. Although the corporation is located in another state, if it does not appear voluntarily it may be proceeded against as an absent defendant.”

In the case of *Chester v. Halliard*, 36 N. J. Eq. 313, a suit was brought by various depositors of a savings bank against certain of its managers on behalf of themselves and such other depositors as might choose to join with them in the litigation seeking to recover the amount of their several deposits from the managers of the institution on two grounds, namely, fraud in misrepresentation as to the condition of the bank, which is not here pertinent, and secondly because the funds of the bank had been squandered by the defendants.

A demurrer to the bill having been interposed, the Court of Errors and Appeals, affirming the trial court's decision sustaining the demurrer on this ground, said at page 315:

“The second ground of complaint stated in the bill is deficient not in form, but in substance. It consists in statements showing that the defendants, as directors of the funds of the bank so mismanaged its affairs that it became insolvent. The bank itself is not a party to the suit, and the consequence is the complainants have no standing in court on this part of their case. If the capital and assets of the corporation have been squandered and lost by the misconduct of its officers, it is the corporate body itself that primarily has been wronged, and reparation is due immediately to it and not to the depositors. The depositors are but creditors of the corporation, and the moneys in question are not their moneys. It is true that as the directors are alleged to be the delinquent parties who are sought to be charged with the liability to make good the losses in question, these depositors have a footing in court to such redress in this matter, but in such proceedings the corporation, or in case of its insolvency, its receiver, must be a party, for it is in right of such corporate body that such a course of law is alone to be vindicated. But I shall not further discuss this subject, for the decisions are uniformly opposed to the legal power of a member of the corporate body to bring a suit in his own right and in disconnection with

the company, for losses occasioned to the corporation by the misconduct of its officers, and the topic has so recently undergone examination by the supreme court in the case of *Conley v. Halsey*, 15 Vr. 111, decided at the last term of that court. This suit cannot be sustained against these defendants on this second ground, the same being thus essentially defective."

In Cook on Corporations (4th Edition) Section 738, in speaking of similar suits brought by stockholders, it is said:

"The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong which the corporation itself should have remedied. This rule is due to the fact that a similar possible suit by the corporation is thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others."

See also:

*Porter v. Sabin*, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110.

*Lathrop, Shea & Henwood Company v. Byrne*, 100 N. Y. S. 104.

*Robinson v. Smith*, 3 Paige 222, 233.

*Davenport v. Dows*, 18 Wallace, 626, 627.

*Boyd v. Mutual Fire Association* (Wisconsin, 1903), 94 N. W. 171, 172.



In the second place the complaint is defective in that it fails to allege, and the evidence is insufficient in that it fails to show, any demand upon the corporation made by the plaintiff before the institution of this suit that it sue to recover the sums converted, or to show any excuse for not so doing. The wrong is primarily to the corporation and any action brought by either a stockholder of a solvent corporation or by a creditor of an insolvent corporation is in the right of the corporation, where, as in this state, the officers and directors of a corporation are not trustees for creditors and the trust fund theory so-called is not adopted.

“Neither the corporation nor its governing body, so long as it is a going concern, holds its property in trust for creditors. The officers or directors occupy a fiduciary relation, demanding care, vigilance, and good faith. If they violate their duty, they at once become responsible to the corporation. If they are guilty of misfeasance or malfeasance, the latter may at once bring an action at law to enforce such liability. If the corporation refuses to act, the stockholders before insolvency, and the creditors after insolvency, may enforce such liability in the right of the corporation, and not otherwise. Such right is not based entirely upon the relation of trusteeship sustained to the creditors, but rather upon the legal right of the corporation to compel them to make reparation for their wrong. The right of the creditor to enforce the rights of the corpora-



tion may be said to rest upon the so-called fiduciary relation which the officers sustain to the corporation and indirectly to them."

*Boyd v. Mutual Fire Association* (Wisconsin, 1903), 94 N. W. 171, 172.

"Generally, where there has been a waste or misapplication of the corporate funds, by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the corporation. But as this court never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant."

*Robinson v. Smith*, 3 Paige, 222, 233.

*Porter v. Sabin*, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110.

*Busch v. Mary A. Riddle Co.*, 283 Fed. 443, 444.

Suits brought by creditors directly against officers of a corporation to recover funds of the corporation alleged to have been misappropriated by the defend-

ant officer are rare. They are, however, analogous to such suits by stockholders.

“Creditors cannot themselves ordinarily maintain actions at law against the directors or other officers of a corporation to recover damages for conversion of its assets or loss by reason of misapplication thereof, or of negligence, since the injury is to the corporation. Generally it is held that the proper mode of enforcing the liability, if the creditor has the right to sue, is by a suit in equity *on behalf of all the creditors and to which the corporation itself is a party.*”

Fletcher on Corporations, Section 2673.

“Actions by creditors against corporate officers for wrongs primarily to the corporation itself are not common, except where the right to sue is created by statute and the common law liability of officers to the corporation or its stockholders cannot generally be enforced by creditors nor can the creditors sue as an individual under ordinary circumstances. Oftentimes, however, a statute creates a liability in favor of the creditors.”

Fletcher on Corporations, Section 2678.

The third defect is that this suit is brought by plaintiff, not in his representative capacity on behalf of all creditors, but for himself alone. The law is sufficiently indicated in the excerpts from decisions already given.

If this suit be considered, not one to recover from the defendant funds which he as an officer of the corporation has misappropriated, but rather a suit to set aside a fraudulent conveyance,—that is to set aside the assignment (not that of January 8, 1918, but the one made after the armistice) to the defendant of the claim of the corporation against the United States Spruce Production Corporation, the making of which is both alleged by the complaint and admitted by the answer,—then two objections are made; First, that the Oregon Pacific Mill and Lumber Company was still an indispensable party and it was incumbent upon the plaintiff to join the corporation as a party defendant when the defect in parties was specifically raised in the answer and also by objection at the outset of the trial; and secondly, that there was a failure both in the allegations of the complaint and in the evidence to show any fraudulent conveyance.

In *Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. Ed. 612, the plaintiffs as judgment creditors of the defendant Kelshaw brought a suit in the Federal Circuit Court to set aside an alleged fraudulent conveyance of land from Kelshaw to Butterworth.

The plaintiffs were alleged to be citizens of Ohio, while defendant Butterworth was alleged to be a citizen of Indiana. The complaint was silent as to the citizenship of the defendant Kelshaw. In the absence of a showing on the face of the bill or in the record of the citizenship of the defendant Kelshaw,

the question of the Federal Court's jurisdiction was thus discussed by the Supreme Court. The court said :

"It is clear, that neither the court below, nor this court, has jurisdiction of the case as between plaintiffs and Kelshaw.

"But as the court might, under some circumstances, proceed to adjudicate on the rights of the parties properly before it, we must look into the case, so far as to see if it is one in which relief may be decreed, as between plaintiffs and Butterworth, without regard to Kelshaw.

"Without referring to the numerous cases in this court and others, on the necessity of having all the proper parties before the court, in a suit in equity, and the circumstances under which the court will proceed in some cases, without persons who might well be made parties, it is sufficient to say that, in the present case, we think Kelshaw is properly made a defendant to this suit. It is a debt which he owes which is sought to be collected. It is his insolvency which is to be established, and it is his fraudulent conduct that requires investigation.

"If the conveyance to Butterworth shall be decreed to be set aside, and the property conveyed to him, subjected to the payment of plaintiffs' debt, it is proper that Kelshaw should be bound by the decree; and to that end he ought to be a party."

In *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603; 37 L. Ed. 577, 580, in speaking of the case of

*Gaylords v. Kelshaw, supra*, it was said that in that case,

“It was held by this court that in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant, because it was his debts that were sought to be collected, and his fraudulent conduct that required investigation.”

See also

*Beswick v. Dorris*, 174 Fed. 502, 508.

That the evidence is insufficient to make out a case of fraudulent conveyance under the laws of Oregon seems obvious, for the circumstances surrounding the assignment of the company's claim against the United States Spruce Production Corporation have none of the usual indicia of fraud. There is absolutely nothing in the record to show either that the assignment was made to hinder, delay or defraud creditors of the corporation or that Mr. Rogers took the assignment with knowledge or notice of any such intention on the part of the corporation, or with any such purpose himself. As a matter of fact, the sole and uncontradicted evidence upon the point is that of Mr. Rogers to the effect that he took the assignment not absolutely as would be the case in a fraudulent conveyance, but simply to accommodate the company and to facilitate the filing of its claim with the Claims Board of the Spruce Production Corporation.

Under these circumstances, it is submitted that plaintiff has quite failed to show either a misappro-



priation of the assets of the corporation by one of its officers or anything even faintly resembling a fraudulent conveyance. The most that can be claimed upon the record is that for purposes of collection only the Oregon Pacific Mill and Lumber Company assigned to Mr. Rogers and that Mr. Rogers received some money upon a claim against the Spruce Production Corporation, which he filed upon his own behalf and as assignee of the company's claim. And the facts in this regard we have already discussed.

If none of the money received by Mr. Rogers was paid him on account of the assigned claim of the corporation, then obviously this suit must fail; if on the other hand Mr. Rogers did receive anything either as trustee or as agent for the Oregon Pacific Mill and Lumber Company, then he became obligated to pay any moneys so received directly to the corporation. The legal question then is not one of fraudulent conveyance, nor one of misappropriation of funds by a corporate officer, but rather whether a mere judgment creditor of a corporation, suing not for all creditors of the company but for himself alone, may maintain a suit directly against a debtor of or trustee for the corporation without joining the corporation as a party plaintiff or defendant, without alleging or proving a demand made upon the corporation that it bring such a suit, and without, in lieu thereof, alleging or proving any facts excusing such demand.

A receiver of a corporation would have power to enforce such obligations in the derivative right of the company; and some courts would doubtless allow a

creditor, suing for all creditors similarly situated, to enforce them, if the corporation or its receiver refused to do so. We have, however, been able to find not a single precedent for such a suit as this is, and it is earnestly submitted that such a suit cannot be maintained. If it can be, then one who is unfortunate enough to be the debtor of an insolvent corporation is liable to as many separate suits as there are creditors of the insolvent corporation, each creditor suing the debtor not on behalf of the corporation and all those interested in it but for himself alone. We do not believe that the law contemplates any such wild scramble on the part of the creditors of an insolvent corporation and that the absence of such cases in the books is good evidence that such suits are not maintainable.

Respectfully submitted,

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**United States Circuit Court  
of Appeals**  
**For the Ninth Circuit**

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CLEM ROGERS

*Appellant*

vs.

BRIX BROS. LOGGING COMPANY, a corporation

*Appellee*

---

Upon Appeal from the United States District  
Court for the District of Oregon

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**Brief of Appellee**

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**FILED**

FEB 5 - 1923

**F. D. MONTGOMERY**  
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No. 3923

**United States Circuit Court  
of Appeals  
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CLEM ROGERS

*Appellant*

vs.

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*Appellee*

---

Upon Appeal from the United States District  
Court for the District of Oregon

---

**Brief of Appellee**

---

**STATEMENT OF THE CASE.**

This is a suit by Brix Bros. Logging Company, hereinafter called Brix Bros., brought against Rogers to compel him to disclose and account for money or property in his hands necessary to pay a judgment secured by Brix Bros. against the Oregon Pacific Mill and Lumber Company, hereinafter called the Oregon Pacific. The Oregon Pacific was

a creature of the war. One Corbaley had an option to purchase a mill and timber in Clatsop County, Oregon, and a tentative plan to secure a government contract to manufacture airplane spruce. The Oregon Pacific (a Nevada corporation), was formed to handle the matter.

Rogers seems to have been a controlling factor in the Oregon Pacific from the beginning, (Record, p. 48), until the end, when, although its general manager, secretary, treasurer, director and the majority stockholder, he took over for himself or otherwise disposed of all of its assets and after that he operated the mill as a sole trader under the name Clatsop County Lumber Company. Almost at the beginning (January 8, 1918) Rogers made himself the body and the Oregon Pacific the shell by having its sawmill at Astoria, timber lands and government contracts conveyed to him and at the same time he was made general manager, treasurer and in substance the majority stockholder, (Record, p. 116). This agreement was a secret one; the papers were merely placed in escrow, (Record, p. 124).

Rogers operated the business as a sole trader from October 1, 1918, and at once gave up the old government contract (Spruce Production Division—4, abbreviated S. P. D—4) and took a new one (S. P. D.—261) but the new contract was only for the unexpired term of the old one and the footage was without doubt the amount undelivered under

the old. The armistice came on November 11, 1918, whereupon the government gave notice that no more spruce deliveries would be accepted. Rogers in his own right and as assignee of the Oregon Pacific filed a claim with the government for reimbursement for damages and was allowed \$60,000 which he collected and receipted for.

Thus far the story of the case has covered the part played by Rogers with the Oregon Pacific; we now come to Brix Bros. In August, 1918, Brix Bros. sold and delivered to the mill operated in the name of Oregon Pacific, spruce logs of the value of \$15,136.39. These logs were sawed into lumber and sold and Rogers collected the proceeds. Brix Bros. not being able to collect its money secured a judgment against the Oregon Pacific in the Circuit Court of Oregon for Clatsop County on July 17, 1919, and on execution was able to reach only \$1,133.46, leaving due on such judgment the sum of \$14,754.01 with interest at six per cent from August 29, 1919. A further execution disclosing no property of the Oregon Pacific, this suit was brought, also in the Circuit Court of Oregon for Clatsop County, to compel Rogers to disclose and account for money or property received by him from or for the Oregon Pacific and requiring him to pay the judgment of Brix Bros. had against the Oregon Pacific in the amount of \$14,754.01 and for a decree against him for that amount. The case was re-

moved by Rogers to the United States District Court for Oregon.

Rogers' amended answer and his position in the District Court as well as here, may be summarized as claiming:

(a) Rogers cannot be compelled by a court of equity to account for property of the Oregon Pacific, it being asserted that he had the right to prefer and pay himself or others and therefore holds no such property at this time;

(b) No recovery can be had because Brix Bros. did not make a demand on the Oregon Pacific to sue Rogers;

(c) The suit must fail because Brix Bros. does not sue for all creditors but for itself, and

(d) Oregon Pacific is an indispensable party and therefore the court was without jurisdiction.

The case was tried before District Judge Bean resulting in a decree for Brix Bros. from which Rogers appeals.



## ARGUMENT.

## I.

At the threshold of the case it must be recalled that Brix Bros. is a judgment creditor of the Oregon Pacific in the amount of \$14,754.01 and neither the account for spruce logs sold nor the judgment based thereon are disputed. Nor can it be disputed, as will be shown presently, that the spruce logs for which this judgment was secured were sold at a time—August 1918—when Rogers was, secretly, in absolute control of the Oregon Pacific with power, as now claimed, to turn over its assets to himself, but as its general manager and in other official capacities holding it out as a real corporation purchasing logs from Brix Bros., selling the product and himself collecting the proceeds.

It is not denied by Rogers that the Oregon Pacific had a mill worth as of September 1, 1918, \$246,312.15 (Record, p. 132), logs and lumber worth \$59,834.95 (Record, p. 133), book accounts, cash and other assets \$91,000.00 (Record, p. 134), and that he collected from the government at a later date \$60,000.00 which was at least connected with the operation of the above property. These items total \$457,147.10, but Rogers, "the angel" of the Oregon Pacific (suggested in appellant's brief, p. 3), saw to it that the judgment of Brix Bros. was not paid, the only relief now offered being the suggestion that "plaintiff with its judgment is merely unfortunate" (appellant's brief, p. 9).

We proceed therefore to analyze the facts showing why the judgment of Brix Bros. was not paid and why a court of equity should award relief.

## II.

Rogers seems to have been a moving spirit in the Oregon Pacific from the beginning for we have his statement "the claimant (Rogers) and his predecessors in interest caused to be organized the Oregon Pacific Mill and Lumber Company" (Record, p. 48). About December 20, 1917, Rogers agreed to put up certain indemnity with a surety company in order that the Oregon Pacific might furnish a bond required in securing government contract S. P. D.—4, (Record, p. 116). This contract, dated December 22, 1917, was secured from the government and called for ten million feet of spruce lumber at \$105 per thousand (Record, p. 88).

But Rogers would not arrange the indemnity without control of the Oregon Pacific and he got it through the agreement of January 8, 1918, (Record, p. 116). By this agreement made with him by the Oregon Pacific, its directors and sole stockholders,

- (a) All its property was granted and assigned to him including contracts with the United States.
- (b) He was made general manager and treasurer "with full power and authority to exercise without any further resolution or authorization \* \* \* each and all powers and rights of said corporation \* \* \* to the same extent that the said powers and rights could be exercised by said corporation, its directors, members, or stock-

holders or officers or attorneys" (Record, p. 118).

- (c) He was to be paid \$250 per month.
- (d) He was to be repaid for any advances he might make at the rate of \$20,000 per month.
- (e) He was to be paid 20% of all net profits of the Oregon Pacific.
- (f) He was to be pledgee of 1,250 shares of stock which was much in excess of a majority.

Other provisions in this agreement merely increased the opportunity of Rogers to operate this corporation for his own personal benefit.

In February, 1918, Rogers concluded that in lieu of the government financing the operation which had required the surety bond and the indemnity from Rogers, he would do the financing and the government was paid back, Rogers furnishing the money. It is quite evident that Rogers kept strengthening his grip over the Oregon Pacific, with the consent of the stockholders, with the plan of securing such profits as might be forthcoming and at the same time secretly protecting himself against claims of creditors, for about this time the deed and bill of sale from the original vendors were taken, not in the name of Oregon Pacific, but in the name of Rogers, (Record, p. 124). These were not recorded but held in escrow and the Oregon Pacific was apparently held out as the operator of the property. On April 7, 1918, Rogers knew the opera-

tions were unsatisfactory and he required the books to be kept in San Francisco, (Record, p. 125). In July, 1918, Rogers came to Portland and as a result of this trip he required that 51% of the stock of the Oregon Pacific be turned over to him, and waived his right to 20% of the profits, (Record, p. 126).

It is thus apparent that by August, 1918, Rogers was the master and in fact the Oregon Pacific. Its board of directors and stockholders had made him its general manager, treasurer, director, majority stockholder, custodian of its books, secret escrow grantee and assignee of its property and on top of all this they had literally voted to give him "all powers and rights of said corporation \* \* \* to the same extent that the said powers and rights could be exercised by said corporation, its directors, members or stockholders or officers or attorneys." If anything remained of the Oregon Pacific but its name or shell it is difficult to know what it was. All this was known to Rogers in August, 1918, and more; he knew it was only a matter of days when he would gather in its property under a claim of forfeiture and it could not pay all its debts.

Under these circumstances Brix Bros. in August, 1918, sold to the Oregon Pacific the logs for which its judgment was later secured. The logs were cut, sold and Rogers collected the proceeds, (Record, p. 6).

On September 1, 1918, Rogers claims to have



taken possession of the property, (Record, p. 127), but the operation was continued as before—by the shell the Oregon Pacific. On September 24, 1918, the board of directors of the Oregon Pacific, consisting now of Rogers, Dohrmann and Rider, the other two directors having resigned, met and solemnly voted approval of Rogers' action in taking possession of the property (Record, p. 127). At this meeting Rogers seems to have annexed the office of secretary and it was Rogers who offered the motion that his taking over the property for his own benefit be approved. It also appears that the deed and bill of sale to Rogers had now been recorded.

On October 8, 1918, a stockholders' meeting of the Oregon Pacific was held, Rogers owning and voting 924 shares out of 1,202 present, (Record, p. 131). At this meeting it was resolved to cancel government contract S. P. D.—4 as of September 30, 1918, but Rogers immediately secured a continuation contract, S. P. D.—261, dated October 8, 1918, (Record, p. 107). This contract covered the unexpired term of S. P. D.—4 with the same monthly deliveries, and the total quantity, conceded to be the balance due, under the first contract, (appellant's brief, p. 5). Contract S. P. D.—261, although signed and approved, was never delivered to Rogers, (Record, p. 100). From October 1, 1918, Rogers operated the property as a sole trader under the name Clatsop County Lumber Company. On



November 11, 1918, the government gave notice that further deliveries of spruce lumber would not be accepted whereupon Rogers prepared and submitted a claim for reimbursement. Here although in supreme control of the Oregon Pacific and its property he claims to have collected nothing on its account and if he did that he was entitled to keep it, Brix Bros. with its judgment, to the contrary notwithstanding.

First of all did he collect anything on account of operations under S. P. D.—4? His claim was based upon the original contract, (Record, p. 47). It is headed "Presented herewith is the claim of Clem W. Rogers in his own right and as assignee of the rights of the Oregon Pacific Mill and Lumber Company for reimbursement for damages suffered by reason of the breach and cancellation by the United States of its contract with claimant." He stated that "the claimant and his predecessors in interest caused to be organized" the Oregon Pacific "and the corporation secured in compliance with the order referred to a certain contract." He further declared "for the sole and only purpose of manufacturing and delivering said airplane spruce called for by said contract \* \* \* the claimant or his predecessors in interest purchased a large amount of timber, a mill and mill site." Thus far the language clearly refers to S. P. D.—4. Other references are to the same effect, of which we quote the following:

“Inasmuch as the claimant and his predecessors in interest entered into this contract for the sole purpose of furnishing airplane spruce to the Government it is willing that said contract should be cancelled. The claimant does not ask the United States Government for any profit that he is able to show would have been made under the original contract, nor does he ask for any loss that he or his predecessors in interest may have suffered by reason of the change in condition ordered by the Government. The claimant does ask at this time to be made whole for the actual investment made for the sole and only purpose of furnishing to the Government spruce which it urgently needed, and to supply it was the sole reason of the investment made.” (Record, p. 49.)

There could seem to be no mistaking of these references and that S. P. D.—261 is not mentioned which was the view of the District Court. But appellant’s brief (page 28) asserts this is error because the claim is presented in part “in his own right” and it is said “its contract” must mean his own contract or S. P. D.—261. The fallacy of this is in failing to consider the language of the claim in its entirety. Furthermore, Rogers by this time had come to look upon all assets and claims of the Oregon Pacific as his and again if we are to follow the example in appellant’s brief (page 28) and split hairs on words “its contract” would not refer to Rogers’ contract but more properly to the Oregon Pacific contract.

But the supporting papers accompanying Rogers' claim further show it was based upon operations under S. P. D—4. Plaintiff's exhibit No. 3, (Record, p. 50), signed by Rogers is a detail statement which discusses S. P. D.—4, but does not mention S. P. D.—261. Furthermore this statement repeatedly refers to "claimants" indicating that the Oregon Pacific operation is included. Finally the certified accountant's reports, (Record, pp. 64-88), which were filed with the claim, seem to demonstrate completely that operations or investments under S. P. D.—4, were the large part if not all of the claim. These reports cover operations and investment of the Oregon Pacific from the beginning.

More than this, there was included by Rogers in the claim filed by him with the government, wherein he asks for reimbursement on investments, the very unpaid account of Brix Bros. for logs sold to Oregon Pacific in August, 1918, (Record, pp. 6, 82). The irony of the situation is apparent when it is remembered that Rogers collected from the government \$60,000 on a claim supported by the Brix Bros. account which made up more than half of the bills payable shown on the account supporting the claim, and Brix Bros. is still unpaid.

The award made by the government of \$60,000, (Record, p. 99) shows a consideration of operations under both contracts, but primarily under the first.

In the language of the District Judge, "its findings recite the history of the transaction from the making of the contract with the corporation in December, 1917, to the refusal of the government to accept further deliveries and based thereon recommended the allowance." (Record, p. 90.) The Contract Board which made the settlement concluded its findings by recommending that "Clement W. Rogers be reimbursed in the sum of \$60,000 in full and final settlement of any and all claims growing out of the cancellation of contracts S. P. D.—4 and S. P. D.—261, it being understood and agreed that this settlement covers all claims of Clement W. Rogers, the Oregon Pacific Mill and Lumber Company and the Clatsop County Timber Company," (Record, p. 103). Rogers filed a written acceptance, in which he agreed to take \$60,000 in full satisfaction "of any and all claims and demands we have or may have \* \* \* in any way growing out of our contracts S. P. D.—4 and S. P. D.—261," (Record, p. 104). Furthermore, Rogers executed a release in which he acknowledged satisfaction of all claims "growing out of or based upon the above mentioned contract S. P. D.—261 and S. P. D.—4," (Record, p. 105).

It seems clear then from a reading of the claim and supporting papers filed by Rogers and the findings and release covering the settlement, that operations under contract S. P. D.—4 were included and settled, and on this point the District Court after



hearing the evidence was convinced. It is difficult, therefore, to understand the insistence found in appellant's brief that the settlement did not include these operations. The fallacy seems to be in overlooking the fact that it was reimbursement for investment which was set up in the claim filed by Rogers and was the basis upon which the government settled. The investment had been made long before Rogers secured contract S. P. D.—261; it was made in the name, at least, of the Oregon Pacific under contract S. P. D.—4. But counsel argues that S. P. D.—4 had been cancelled by the Oregon Pacific and therefore no part of the \$60,000 covered operations under that contract. It will be remembered that Rogers was the majority stockholder whose action authorized the cancellation and Rogers immediately secured a new contract which was a mere continuation of the old. Furthermore, whether S. P. D.—4 was cancelled or not, the investment upon which reimbursement was sought had already been made and this was the basis of the claim and settlement. Again it is argued in appellant's brief that because the Contract Board figured on amortizing the investment for the balance of the term of eighteen months, all of the allowance should belong to Rogers because he would have operated under contract S. P. D.—261 for the balance of the term. Again, the fact that amortization was based upon the investment seems to be wholly overlooked.



The plain fact is that this award of \$60,000 was as much the property of the Oregon Pacific as the sawmill, logs, lumber, or accounts and no fine-spun method of figuring can prevent its right application with other property of the Oregon Pacific to the payment of a just and lawful judgment secured by Brix Bros. We have pointed out with considerable detail the chronological history of Rogers in this entire transaction. It establishes one of two legal results, either the Oregon Pacific must be disregarded and Rogers looked upon as the real force operating the business in August, 1918, when the Brix Bros.' account was earned, or Rogers so manipulated the business and assets of the Oregon Pacific as that in equity and good conscience, he will not be permitted to prefer himself and must account for enough property, which confessedly came into his hands from the Oregon Pacific, to pay the Brix Bros.' judgment.

### III.

It has been pointed out that in August, 1918, Rogers was virtually the Oregon Pacific. The entire management, control and operation of the business was in his hands and looking at the substance rather than the form, it was Rogers' business that was being carried on, his money was being invested and he was anticipating the profits. Under these circumstances the case would seem to call for an application of the rule wherein courts

look through corporate forms for the purpose of justice to ascertain the rights and the true relations of the parties. If it was Rogers' business that was being done when Brix Bros. sold the spruce logs, then Rogers should pay the judgment. Illustrations may be given of the rule above mentioned and they are to be found covering a variety of situations. Some of the cases are:

*Chicago, M. & St. P. Ry. Co. vs. Minneapolis etc. Association*, 247 U. S. 590, 38 S. C. R. 553.

*Cleveland-Cliffs Iron Co. vs. Arctic Iron Co.*, 261 Fed. 15.

*United States vs. Beebe*, 127 U. S. 338, at 344.

*J. J. McGaskill Co. vs. United States*, 216 U. S. 504, 30 S. C. 386, 391.

In the first case cited the court after pointing out the existing relations of corporations, said:

“With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public.”

In the *McGaskill Company* case last cited, the court said:

“Undoubtedly a corporation is, in law, a

person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, Sections 663, 664 and 727."

With this view of the case it is clear that a court of equity could require Rogers to pay the Brix Bros. judgment because it was in fact Rogers' debt.

*In re Eilers Music House*, (C. C. A. 9th Circuit), 270 Fed. 915, this court in a proceeding to uncover and disclose assets, although not a judgment creditor's suit, adopted the following language of the referee:

"In such cases equity looks through and beyond legal fictions and deals with the parties and the properties irrespective of corporate forms, upon the theory that now to contemplate Oregon Eilers as an independent organization which its promoters may take to themselves from the general assets, is a legal fraud

upon the creditors. This principle has been many times applied and is abundantly established by the following cases:" (citing cases).

In any event this case is essentially in the nature of a judgment creditor's suit. It falls within the principles covered by Mr. Pomeroy in his excellent discussion in Vol. V, Pomeroy's Equity Jurisprudence, Fourth Edition, Sections 871 to 895. As said in *Pierce et al. vs. U. S.*, 255 U. S. 398, 41 S. C. R. 365 at 366:

"A judgment creditor's bill is in essence an equitable execution comparable to proceedings supplementary to execution. See *Ex Parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200. The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disabie itself from responding by distributing its property among its stockholders and leaving remediless those having valid claims. In such a case the claims after being reduced to judgments may be satisfied out of the assets in the hands of the stockholders."

Rogers, with all the control over the Oregon Pacific that could be exercised, has taken over and paid to himself or otherwise disposed of, assets amounting to \$457,147.10. He claims to have used these assets to pay himself or other creditors, excluding, however, the Brix Bros.' judgment. The arrangement by which he undertakes to justify such action was a secret one known to himself but not to Brix Bros. at the time the spruce logs were sold. The credit which the Oregon Pacific was able to



secure from Brix Bros. was made possible by Rogers' concealment of the situation. It may be Rogers as a creditor of the Oregon Pacific owed no duty to Brix Bros., but as a general manager, director, majority stockholder and in other official capacities, he should not be permitted to encourage the sale of spruce logs by Brix Bros. the benefits of which he was to secure through his secret advantage as a creditor.

The position of Rogers in holding out the Oregon Pacific and then in taking over all of its assets, including the settlement of \$60,000 secured partly through a showing of the very claim which has not been paid, was under the facts shown a fraud on the creditor. It is the opposite of fair dealing and it is submitted, is such a situation as courts of equity are empowered to inquire into and give relief.

The reported cases cover a variety of facts in creditor's suits and no good can come from a discussion of such facts. Illustrative cases, however, in this Circuit are to be found in

*Feidler vs. Bartleson*, (C. C. A. 9th Circuit),  
161 Fed. 30.

*Murray vs. Sioux Alaska Mining Co.*, (C. C.  
A. 9th Circuit), 239 Fed. 818.

In *Clere Clothing Company vs. Union Trust and Savings Bank*, (C. C. A. 9th Circuit), 224 Fed. 363, in a bankruptcy proceeding the Clere Clothing



Company occupied much the same position as Rogers here. This court said:

“The scheme of the Clothing Company is easily discerned. It proposed to play safe, regardless of the ultimate condition of the Prager-Schlesinger Company. If the latter company should be successful there can be no doubt that the profits would have gone to the Clere Clothing Company or to the National Bank of Commerce in payment of the indebtedness of the Clothing Company. If the Prager-Schlesinger Company should fail, as it did in fact fail, the Clothing Company proposed to be in position to prevent and insist upon the payment of its alleged claims. Such tactics are not to be commended. A corporation may not for a period of over a year so entwine its affairs and business transactions with a second company as to virtually create the relation of principal and agent, and then upon the insolvency of the second company, insist upon the payment of alleged debts incurred in the very transactions by which the relationship was created.”

The situation of Rogers is again illustrated by the language of the court in *Baltimore and Ohio Telegraph Company vs. Interstate Telegraph Company*, (C. C. A. 4th Circuit), 54 Fed. 50. Here the Baltimore and Ohio Railroad Company had organized the Baltimore and Ohio Telegraph Company and dominated its affairs. It claimed to be a stockholder and creditor of the Baltimore and Ohio Telegraph Company, and compelled the latter company to turn over or sell all of its assets and undertook to pay itself. In the meantime the Baltimore and

Ohio Telegraph Company had incurred obligations to the Interstate Telegraph Company which had resulted in a judgment against the former. The court held that when the Baltimore and Ohio Railroad Company took possession of, controlled and appropriated the property, it was bound to pay the debt, saying:

“This result follows, whether it acted as sole beneficial owner of all its stock, or as creditor who had made large advances, or as principal who had placed large and valuable assets in the hands of its agent, as ostensible owner, and thus secured its credit, or as vendor who had sold on credit without taking mortgage security, or as lessor who had entered upon the possession of its lessee.”

#### IV.

Objection is made by appellant that no recovery can be had because Brix Bros. did not make a demand on the Oregon Pacific to sue Rogers. This objection confuses suits by or against stockholders as such with judgment creditors' suits. Here Brix Bros. had already sued the Oregon Pacific in the state court for Clatsop County and had obtained its judgment. It was unable to satisfy the judgment through execution, and then brought this suit in equity in the same state court against Rogers. It is not seeking to enforce a right of the corporation against Rogers, but it sues in its own right. The corporation was apparently satisfied with having turned over all of its property and assets to Rogers

and virtually disenfranchising itself; indeed, Rogers had become the controlling factor in the corporation and so far as the record shows, is still in that capacity. It is difficult to understand therefore, what good could have been done by demanding of the corporation dominated by Rogers, that it sue Rogers. Equity does not require vain things and this seems to be an excellent application of that rule.

Furthermore, a judgment creditor's suit is, to quote again the language of the Supreme Court in the *Pierce* case, *supra*, "an equitable execution comparable to proceedings supplementary to execution." An early case (*Gould vs. Torrance*, 19 How. Prac. 560), defines a judgment creditor's bill as being in the nature of an additional or equitable execution and not in any sense a new suit. It is submitted, therefore, that this objection must fail. The cases cited in appellant's brief on this point seem to be stockholders' suits where the rights asserted were strictly on behalf of the corporations. They do not involve judgment creditors' suits but in the main involve proceedings by stockholders to appoint receivers and wind up the corporations. Some of them discuss the right of a simple contract creditor which is entirely different from a case of "equitable execution comparable to proceedings supplementary to execution." (*Pierce* case, *supra*.)

## V.

But it is urged by appellant that this suit must fail because Brix Bros. does not sue for all creditors. In the first place, it is not clear that there are other creditors, or if so, who they are, except it is claimed that Rogers and Dohrmann are creditors. As to Dohrmann, it is evident from the record that he was a stockholder and apparently acquiesced in the secret arrangements carried on by Rogers and in the transfer of all of the assets of the Oregon Pacific to Rogers. He was apparently content to wash his hands of the entire matter and since he was willing that all of the property, assets, and rights of the Oregon Pacific be turned over to Rogers it is not extraordinary that he has refrained from calling Rogers to account for any money, as suggested in appellant's brief, page 23. Dohrmann as a stockholder and at the beginning partly responsible for the venture, has evidently dismissed the matter.

It is said in appellant's brief, page 24, "there are still numerous other creditors of this company who have never been paid." This is putting the matter rather strong. The only warrant for such statement is Rogers' claim "there are apparently still other claims as yet unpaid," (Record, p. 134). The amount of these claims or their owners, are not shown. So far as appears, therefore, Brix Bros., with its judgment is the only substantial



claim outstanding which was incurred in good faith and is entitled to be paid.

The objection that it does not sue for all creditors seems to be effectively disposed of by this court in *Murray vs. Sioux Alaska Mining Company*, 239 Fed. 818, where it was said:

“The point that the action is not brought on behalf of appellant and other creditors is not fatal to the bill. *Tatum vs. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97. At most there would be a defect of parties plaintiff, which is a ground of special demurrer, or the point might perhaps be presented by answer. *Morrison vs. Blue Star Navigation Co.*, 26 Wash. 541, 67 Pac. 244. In *Birely's Executors vs. Staley*, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303, in a suit in equity to vacate conveyances, two creditors joined in the bill of complaint, and it was urged that all or one only should have been made party complainant. The court held that that was a mere formal objection, and if well taken might have been removed by amending the bill. The court said:

“‘Rules of pleading in equity are not governed by the same technicality as to matters of form that controls proceedings at law. Courts of equity look to substance, not form. The distinction, then (if it exist at all, which we cannot admit), is a mere matter of form; nothing in reason or substance can be urged in its support. If one of many creditors proceed, and be successful, the fund is retained in chancery until all the creditors are notified to come in and assert their claims. The same practice prevails on like proceeding by two.’”

It is to be remembered that no objection on this



point was raised by answer or at the trial and if objection had been made we submit it is not fatal to the case.

## VI.

Finally, it is claimed by appellant that the Oregon Pacific is an indispensable party to this suit and therefore the court was without jurisdiction to make its decree.

The cases cited in appellant's brief from New York and New Jersey are not based on facts, at all, comparable with the facts here. Furthermore, the rule as to indispensable parties has been much relaxed in the Federal Courts as against the rule announced in some of the early State Court decisions. This relaxation was in order to prevent Federal Courts from losing jurisdiction due to requirements as to diversity and residence of parties. (Simpson, Federal Equity Suit, Third Edition, Chapter XL.)

Mr. Justice Sanborn in *Rogers vs. Penobscot Mining Company*, (C. C. A. 8th Circuit), 154 Fed. 606, defines such a party as:

"An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

In this case how can it be said that the Oregon Pacific would be radically or at all affected by the decree? Where is there any lack of equity or good conscience in the decree against Rogers without the presence of the Oregon Pacific? The claim had already been litigated with that corporation and the validity of the claim has been settled. Furthermore, all of the property and assets have been turned over to Rogers, and the corporation itself has no interests to be affected. Moreover, Rogers was and is the master of the corporation, with its consent, and therefore represents it.

The case is well illustrated by *Bank of Commerce and Trusts of Richmond vs. McArthur* (C. C. A. 5th Circuit), 256 Fed. 84, where the court said:

“In behalf of the appellees it is contended that the dismissal of the bill is sustainable on the ground stated in the decree, namely:

“‘That the defendants Adam McArthur, J. Sprunt Newton, and W. M. Walker are necessary parties to this cause, and that they are not citizens or residents of the State of Florida, and not subject to the process of this court, and cannot be subjected to the jurisdiction thereof by personal or constructive service.’

“The property sought to be subjected to the satisfaction of the appellant’s demands is the above referred to Florida property which formerly belonged to Adam McArthur, and was transferred by him as above stated. Under the averments of the bill, that former owner of the property in question no longer has any interest in it. He has no such interest in the subject of the suit as requires that he be

made a party to it. He would not be prejudiced or affected by a decree subjecting the property in question to the satisfaction of the appellant's demands. The attacked transfers and conveyances are binding as between him and his transferees or grantees, the resident defendants proceeded against. The averments of the bill show that those transfers are not binding upon the appellant, the transferor's creditor. Relief sought could be granted without affecting either of the three non-residents who were named as defendants. As to them, the suit can be abated, and it may then be prosecuted against the resident defendants. No one of the three named non-residents is an indispensable party to the suit."

The point that the Oregon Pacific is an indispensable party in this, a judgment creditor's suit, seems to be settled by the language of the Supreme Court in *Pierce vs. United States*, 255 U. S. 398, 41 S. C. R. 365 at 368. In that case the United States had secured a judgment against Waters-Pierce Oil Company. It brought a judgment creditor's suit against Waters-Pierce Oil Company, trustees, and certain stockholders. The property of the corporation had been sold to another and the proceeds paid to the trustees and in turn distributed among the stockholders. The District Court dismissed the bill as to the Waters-Pierce Oil Company and the trustees, but granted relief against the stockholders. The court said:

"The contention is faintly made that the decree should be reversed because the District Court dismissed the bill as against the Waters-

Pierce Oil Company, a necessary party, citing *Swan Land & Cattle Co. vs. Frank*, 148 U. S. 603, 610, 13 Sup. Ct. 691, 37 L. Ed. 577. The argument ignores the fact that this judgment, being in favor of the United States, is, under Section 986 of the Revised Statutes, effective and may be made the basis of an execution running in a state and district other than that in which the judgment was rendered. It was doubtless for this reason that the District Judge concluded that it was unnecessary, if not improper, to enter in this suit judgment against Waters-Pierce Oil Company. The objection is purely technical."

It will be seen from this language that the court found that since the judgment under the Federal statute was effective in the district in which the creditor's suit had been brought, therefore, any further judgment or decree against the debtor corporation was entirely unnecessary and of no purpose. It will be remembered that the Brix Bros. judgment was secured in the same court in which the creditor's suit was instituted. The Oregon Pacific had turned over its property so far as it was concerned to Rogers, and it was against Rogers that the suit was brought—by Brix Bros. in its own right—to compel him to disclose property and respond for this judgment. It is submitted that Rogers' anxiety over the absence of the non-resident Oregon Pacific (a Nevada corporation), or that it will be injured by the decree against him because it is not a party, can hardly be taken seriously.



## CONCLUSION.

It is submitted that the facts of this case conclusively show Rogers to have been the real entity operating the Oregon Pacific in August, 1918, through a secret arrangement known to himself and the Oregon Pacific. Credit was obtained under these circumstances and he cannot deny responsibility for obtaining such credit because he was in charge. When it suited his purpose, he announced to the world that he had taken actual possession of all the property and he has undertaken to use it, in the main, by paying himself.

Under the circumstances of the case, the language of Mr. Justice De Haven in *Blanc vs. Paymaster Mining Company*, 95 Calif. 524, in discussing an early Federal case, (*Hibernia Insurance Company vs. St. Louis etc. Company*, 13 Fed. 516), is quite appropriate:

“The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones,—was, in short, the old corporation,—and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be so? The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired, and possibly to the full extent,—that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable



pretenses are to be disregarded. Shiftings of corporate names cannot defeat positive rights, any more than the change of the name of a natural person can absolve him from his personal obligations."

The case at bar is a judgment creditor's suit with adequate power in a court of equity to reach assets. These assets existed and they have been found. It is submitted that the facts and the law support the decree and it should be affirmed.

Respectfully submitted,

CAREY AND KERR,

G. C. FULTON,

OMAR C. SPENCER,

Attorneys for Appellee.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

HARRY KOCKOS and ANDREW KOCKOS,  
Copartners Doing Business Under the Firm  
Name and Style of KOCKOS BROS., and  
KOCKOS BROS., a Partnership,  
Plaintiffs in Error,  
vs.  
C. ITOH & CO., LTD., a Corporation,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

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FILED

OCT 21 1922

F. D. MONCKTON,  
CLERK



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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HARRY KOCKOS and ANDREW KOCKOS,  
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**Names and Addresses of Attorneys of Record.**

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RAYMOND PERRY, Esq., Mills Bldg., San  
Francisco, Calif.,

Attorneys for Plaintiffs in Error.

Messrs. BROWNSTONE & GOODMAN, Hum-  
boldt Bank Bldg., San Francisco, Calif.,

Attorneys for Defendant in Error.

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In the District Court of the United States for the  
Northern District of California.

C. ITOH & CO., LTD., a Corporation,

Plaintiff,

vs.

HARRY KOCKOS and ANDREW KOCKOS,  
Copartners Doing Business Under the Firm  
Name and Style of KOCKOS BROS., and  
KOCKOS BROS., a Partnership,

Defendants.

**Complaint.**

Plaintiff complains of defendants and for cause  
of action alleges:

1. Plaintiff C. Itoh & Co., Ltd., is a corporation  
created and organized and existing under and by  
virtue of the laws of Japan.

2. Defendants Harry Kockos and Andrew  
Kockos are now and were at all times herein men-  
tioned copartners doing business in and residing  
in the City and County of San Francisco, in the

Northern District of California, and are now and were at all times herein mentioned citizens and residents of the said State of California.

3. That said plaintiff herein is a citizen of a foreign state, to wit, Japan, being a corporation created, organized and existing under and by virtue of the laws of Japan; this is a suit of a civil nature and the amount in controversy herein exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000.00) Dollars.

4. Heretofore, to wit, on November 28, 1919, at Seattle, Washington, plaintiff and defendants made and entered into the following contract:

Seattle, Wash., November 28, 1919.

**MERCHANDISE CONTRACT.**

**BUYERS:** Kockos Bros., San Francisco, California. [1\*]

**SELLERS:** C. Itoh & Co., Ltd., Seattle.

**MERCHANDISE:** Chinese Shelled Panuts, 40 Count (Average).

**QUANTITY:** Approximately One Hundred (100) Tons.

**QUALITY:** 1919 Crop F. A. Q. of the Season's crop.

**TIME OF DELIVERY:** December/January from the Orient.

**PLACE OF DELIVERY:** Seattle, Washington.

**PRICE:** 12¢ per pound F. O. B. Cars, duty paid.

**TERMS:** Sight Draft against Railroad Bill of Lading (Collection charges for Buyer's Account.)

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\*Page-number appearing at foot of page of original certified Transcript of Record.



WEIGHT: Seattle Net Re-weights.

REMARKS: Seattle Chamber of Commerce Certificate of Inspection final as to Crop, Count, Quality and Condition.

This sale is based on present United States Customs-House Classification, any change in same being for buyer's account. Sellers are not responsible for nondelivery or delay of delivery, nor for any damage or loss resulting directly or indirectly from acts of God, perils of the sea, restrictions imposed by any Government, State or Government authority, strikes, riots, fires, floods, accidents, epidemics, war insurrections, lockouts, breakdowns of machinery, shipping restrictions, embargoes, commandeering of vessel or from any causes beyond control of seller at any time. Such delay, however, shall not excuse buyers from accepting delayed delivery. In no case shall seller be responsible after delivery of goods in good condition to carrier at place designated in contract.

All war or excise taxes levied or assessed, after date of this contract in any way affecting this sale of said goods, are for buyer's account.

KOCKOS BROS.,

By ANDREW KOCKOS,

Buyers.

C. ITOH & CO., LTD.,

By N. NAKAMURA,

Sellers."

A. U. PINKHAM & CO.,

By A. U. PINKHAM,

Broker.

5. Plaintiff has in all respects complied with the terms and conditions of the aforesaid contract on its part to be performed and upon arrival of said peanuts from the Orient in early March, 1920, tendered and offered to deliver to said defendants the said one hundred (100) tons of Chinese shelled [2] peanuts as described in the aforesaid contract and the said defendants inspected and examined the same and after such inspection and examination, the said defendants requested plaintiff to ship the same to Chicago, Illinois, from Seattle, Washington. That plaintiff complied with such request and shipped said peanuts to Chicago and upon arrival at Chicago, plaintiff again tendered and offered to deliver the same to defendants, and the said defendants then refused and neglected to accept delivery thereof.

6. The excess of the amount due from said defendants to plaintiff under said contract for said one hundred (100) tons of Chinese shelled peanuts, over the value of the same to plaintiff, was and is the sum of eighty-five hundred (\$8500.00) dollars.

7. The market value of said one hundred (100) tons of peanuts at Seattle, Washington, during February, March and April, 1920, was and is the sum of fifteen thousand five hundred (\$15,500.00) dollars.

8. By reason of the failure of defendants to accept delivery of said peanuts as aforesaid, plaintiff has been damaged in the sum of eighty-five

hundred (\$8500.00) dollars, no part of which sum has been paid.

AS A SECOND, SEPARATE AND FURTHER CAUSE OF ACTION, plaintiff complains and alleges:

1. Incorporates as part of this its second cause of action, paragraphs 1, 2, 3, 4 and 5 of its first cause of action, the same as if all of said paragraphs were herein set out in full.

2. That after the arrival of said peanuts in Chicago, and the refusal of the defendants to accept the same, plaintiff notified defendants that unless defendants accepted the said [3] peanuts, plaintiff would sell the same for their account. Thereafter and after the said defendants refused and neglected to accept the same, and after notice to defendants of the time and place of sale, plaintiff sold said peanuts for the account of defendants, receiving therefor the full market price thereof. That the net proceeds of said sale was fifteen thousand five hundred (\$15,500.00) dollars. That the excess of the amount due from defendants under said contract over the net proceeds of said sale is the sum of eighty-five hundred (\$8500.00) dollars, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against defendants for the sum of eighty-five hundred (\$8500.00) dollars, together with interest from the date of filing this complaint at the legal rate and costs of suit.

BROWNSTONE & GOODMAN,  
Attorneys for Plaintiff.

State of California,  
City and County of San Francisco,—ss.

Louis H. Brownstone, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff named in the foregoing complaint; that said plaintiff resides out of the county where affiant has his office, to wit, said plaintiff resides out of the City and County of San Francisco, State of California, and for that reason, affiant makes this affidavit on behalf of plaintiff; affiant has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on [4] information or belief and as to those matters he believes it to be true.

LOUIS H. BROWNSTONE.

Subscribed and sworn to before me this 7th day of October, 1920.

[Seal]

JOHN WISNOM,

Notary Public in and for the City and County of  
San Francisco, State of California.

In this cause the defendants Harry Kockos and Kockos Bros., a copartnership, etc., having been regularly served with process, as appears from the record and papers on file herein, and having failed to appear and plead, answer or demur to plaintiff's complaint, within the time allowed by law, and the time for appearing and pleading, answering and demurring having expired.

Now, upon application of Messrs. Brownstone and Goodman, attorneys for plaintiff, the default



of the defendants Harry Kockos and Kockos Bros., a copartnership, etc., is hereby entered herein, according to law.

In Testimony Whereof, I have hereunto set my hand and seal of the District Court of the United States, for the Northern District of California, this 6th day of November, A. D. 1920.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed Oct. 7, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

---

**Summons.**

**UNITED STATES OF AMERICA.**

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

C. ITOH & CO., LTD., a Corporation,

Plaintiff,

vs.

HARRY KOCKOS and ANDREW KOCKOS,  
Copartners Doing Business Under the Firm  
Name and Style of KOCKOS BROS., and  
KOCKOS BROS., a Partnership,

Defendants.



Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

BROWNSTONE & GOODMAN,  
Plaintiff's Attorneys.

The President of the United States of America,  
GREETING: To Harry Kockos and Andrew Kockos, Copartners Doing Business Under the Firm Name and Style of Kockos Bros. and Kockos Bros., a partnership, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the Southern Division of the United States District Court for the Northern District of California, Second Division, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 7th day of October, in the year of our Lord one thou-

sand nine hundred and twenty and of our Independence the one [6] hundred and forty-fifth.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

United States Marshal's Office,  
Northern District of California.

I HEREBY CERTIFY, that I received the within writ on the 11th day of Oct., 1920, and personally served the same on the 11th day of October, 1920, upon Harry Kockos, by delivering to and leaving with said defendant named therein personally, at the City and County of San Francisco in said District, a certified copy thereof, together with a copy of the complaint, certified to by — attached thereto.

J. B. HOLOHAN,

U. S. Marshal.

By Lawrence J. Conlon,

Office Deputy.

San Francisco, October 11th, 1920.  
Northern District of California,—ss.

I hereby certify and return, that on the 11th day of Oct., 1920, I received the within summons and that after diligent search, I am unable to find the within-named defendant Andrew Kockos within my district.

J. B. HOLOHAN,

United States Marshal.

By Lawrence J. Conlon,

Deputy United States Marshal.

[Endorsed]: Filed Nov. 6, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

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**Notice of Motion to Set Aside Default.**

To the Above-named Plaintiff and to Its Attorneys,  
Messrs. Brownstone & Goodman:

YOU, AND EACH OF YOU, WILL PLEASE  
TAKE NOTICE that on Monday, the 9th day of  
May, 1921, at the hour of ten o'clock A. M., or  
as soon thereafter as counsel can be heard, defend-  
ant Harry Kockos will move to the above-entitled  
Court for an order vacating, annulling and setting  
aside the default of the said defendant Harry  
Kockos heretofore entered.

Said motion will be made upon the grounds of  
mistake, inadvertence, surprise and excusable neg-  
lect of the said defendant, upon the affidavits of  
H. F. Chadbourne and Harry Kockos herewith  
attached, and upon the copy of the pleading pro-  
posed to be filed herein by the said defendant,  
Harry Kockos, and upon all the records, files and  
papers in the above-entitled cause.

JOHN S. PARTRIDGE,  
Attorney for Defendant, Harry Kockos.

(Title of Court and Cause.)

State of California,

City and County of San Francisco,—ss.

Harry Kockos, being first duly sworn, deposes  
and says:

That he is one of the defendants in the above-  
entitled cause; that he has fully and fairly stated

to his attorney, John S. Partridge, all of the facts in connection with the transactions set forth in plaintiff's complaint on file herein, and that after such statement he has been advised by his said attorney that he has a good and meritorious defense to said complaint.

WHEREFORE, affiant prays that his default be vacated, [8] annulled and set aside.

HARRY KOCKOS.

Subscribed and sworn to before me this 2d day of May, 1921.

[Seal]

MARY D. F. HUDSON,

Notary Public in and for the City and County of  
San Francisco, State of California.

(Title of Court and Cause.)

State of California,

City and County of San Francisco,—ss.

H. F. Chadbourne, being first duly sworn, deposes and says:

That he is an attorney at law and is connected with the office of John S. Partridge, the regular attorney for the defendant herein, Harry Kockos; that on or about the 11th day of October, 1920, the said Harry Kockos called at the office of the said John S. Partridge in the city and county of San Francisco, State of California, and delivered to affiant herein a copy of the complaint and summons in the above-entitled action and informed affiant herein that the said copy of complaint and summons had been served on him on that day, and the said Harry Kockos at the same time requested



affiant herein to enter his appearance in said cause, that through mistake, inadvertence and excusable neglect the said copy of complaint and summons was placed in the files in the office of said John S. Partridge in which was contained the papers, records and files in another matter in which the said Harry Kockos was a party, and the said copy of complaint and summons was entirely lost sight of by affiant until affiant herein was advised that [9] the default of the said Harry Kockos had been entered; that affiant immediately upon learning of the entry of the default of said Harry Kockos telephoned the attorney for the plaintiff herein, Mr. Louis H. Brownstone, and explained the facts herein stated to the said Louis H. Brownstone and requested him to consent to having the said default vacated, annulled and set aside; that the said Louis H. Brownstone informed affiant that he had no authority to grant the request of affiant but that he would consult his associates in Seattle, Washington, and would advise affiant later; that later on affiant was advised by the said Louis H. Brownstone that his said associates would not consent to setting aside the said default.

WHEREFORE, affiant prays that the default of the defendant, Harry Kockos, heretofore entered, be vacated, annulled and set aside, and that said defendant, Harry Kockos, be permitted to enter his appearance in the above-entitled cause.

H. F. CHADBOURNE.



Subscribed and sworn to before me this 29th day of April, 1921.

[Seal]

MARY D. F. HUDSON,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Receipt of a true copy of the within notice is hereby admitted this 2d day of May, 1921.

BROWNSTONE & GOODMAN,  
Attys. for Plaintiff.

[Endorsed]: Filed May 4, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

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(Title of Court and Cause.)

**Demurrer.**

Now comes the defendant, Harry Kockos, and demurring unto the complaint of plaintiff on file herein, for grounds of demurrer alleges:

**I.**

That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

**II.**

That said complaint is uncertain in that it cannot be ascertained therefrom whether the value of one hundred (100) tons of Chinese shelled peanuts to the plaintiff was the sum of eighty-five hundred dollars (\$8500.00), at Chicago, Illinois, or at Seattle, Washington.

**III.**

That said complaint is unintelligible in the same

particulars as herein set forth that it is uncertain.

IV.

That said complaint is ambiguous in the same particulars as herein set forth that it is uncertain and unintelligible.

WHEREFORE, defendant, Harry Kockos, prays that plaintiff take nothing by this action and that he be hence dismissed with his costs.

JOHN S. PARTRIDGE,

Attorneys for Defendant, Harry Kockos.

I hereby certify that I am the attorney for Harry Kockos, one of the defendants in the above-entitled action; that in my opinion, the foregoing demurrer is well taken in point of law and that the same is not interposed for purposes of delay.

JOHN S. PARTRIDGE. [11]

[Endorsed]: Filed May 4, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

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At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 9th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,454.

C. ITOH & CO.

vs.

HARRY KOCKOS et al.

**(Order Granting Defendants' Motion to Set Aside  
Default, etc.)**

Defendants' motion to set aside default of defendants Harry Kockos and Kockos Bros. came on to be heard and after arguments being submitted it was ordered that said motion be and the same is hereby granted on condition that within 5 days the defendants pay \$150.00 as counsel fee to plaintiff's attorney and that an answer be filed within 5 days. Ordered that the defendant's demurrer be stricken from the files and that the cause keep its place on the trial calendar if plaintiff shall so desire. [13]

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(Title of Court and Cause.)

**Answer.**

Now come the defendants above named and in answer to the complaint of plaintiff on file herein admit, deny and allege:

**I.**

That these defendants have no information or belief as to the corporate existence of plaintiff, and placing their denial upon that ground deny that plaintiff is a corporation created and or-

ganized and existing, or created or organized or existing under and by virtue of the laws of Japan.

## II.

That these defendants have no information as to the allegation set forth in paragraph 3 of plaintiff's complaint as to the citizenship of the plaintiff, and placing their denial upon that ground deny the same.

## III.

Admit that on or about the 28th day of November, 1919, the plaintiff and defendants entered into a contract set forth in paragraph 4 of said complaint for the purchase of Chinese shelled peanuts, 40 count average.

## IV.

Deny that plaintiff has in all respects, or in any way or at all, complied with the terms and conditions, or terms or conditions of the contract on its part to be performed, or at all, and deny that upon arrival of said peanuts, or any peanuts, or at all, from the Orient, or at all, in early March, 1920, or at any other time, or at all, tendered and offered or tendered or offered, or at all, to deliver to the defendants one hundred (100) tons of Chinese shelled peanuts as described in the contract, or any other peanuts of 40 count average, and [14] deny that upon defendants' inspection and examination of the peanuts alleged to have been tendered said defendants requested the plaintiff to ship the same to Chicago, Illinois, from Seattle, Washington. In this behalf defendants allege that upon the representation of the plaintiff that

the peanuts so tendered were of the 40 count average, and upon that representation alone did the defendants give plaintiff shipping instructions to ship the same to Chicago, Illinois. Admit that after said shipping instructions were given to plaintiff and upon the tender of documents from plaintiff to defendants that defendants refused to accept delivery thereof, and in this behalf allege that plaintiff did invoice the defendants for sixteen hundred (1600) bags of Chinese shelled peanuts 38/40 count and four hundred (400) bags Chinese shelled peanuts 38/40 count, and did tender a certificate of the Seattle Chamber of Commerce and upon inspection of said certificate of the Seattle Chamber of Commerce, which under the said contract between parties as set forth in plaintiff's complaint was final as to crop, count, quality and condition, these defendants did ascertain for the first time that the count of said peanuts so tendered were an average count of 37 with the exception of five hundred sixty bags (560). That defendants immediately notified plaintiff that the tender was not within the terms of the contract and did offer to accept and pay for the five hundred sixty (560) bags shown to be within the terms of the contract, but that plaintiff refused to deliver said five hundred sixty (560) bags to said defendant.

#### V.

Deny that the excess of the amount due from the defendants to the plaintiff under the contract for said or any one hundred (100) tons of Chinese



shelled peanuts, over the value of the same to the plaintiff, or at all, was and is, [15] or was or is the sum of *eight thousand five hundred*, or any other sum, or at all.

## VI.

Deny that the market value of one hundred tons of Chinese shelled peanuts average 40 count at Seattle, Washington, or at any other place, during February, March and April, 1920, was and is the sum of fifteen thousand five hundred (\$15,500.-00) dollars, or any other sum, or at all, and in this behalf defendants allege that during the month of February and March, 1920, the market price at Seattle, Washington, and other places in the United States was the full contract price of twenty-three thousand nine hundred twenty-five (23,925) dollars. That during the month of April there was a slight decline in Chinese shelled peanuts.

## VII.

Deny that by reason of the failure or any failure or any act of defendants, or at all, to accept delivery of said peanuts, or any peanuts of 40 count average, plaintiff has been damaged, or is damaged, or at all, in the sum of eight thousand five hundred (\$8,500) dollars, or any part or portion thereof.

In answer to the second, separate and further cause of action defendants admit, deny and allege:

### I.

As to the allegations incorporated and referred to in paragraph 1 of said second cause of action

referring to paragraphs 1, 2, 3, 4, and 5 of said first cause of action, the defendants herewith incorporate and refer to the respective admissions and denials set forth in the answer to the first cause of action as if the said denials were herewith set forth in full.

## II.

Admit that upon the arrival of the peanuts in Chicago, [16] to wit, one thousand four hundred forty (1440) bags of 37 count, and 560 bags of 40 count defendants refused to accept same for not being 40 count average, and deny that said plaintiff notified said defendants that unless said defendants accepted said peanuts in full compliance with the contract plaintiff would sell the same for defendants' account, and in this behalf allege that plaintiff only notified defendants that it would hold them for all damages for the non-payment of their draft. Admit defendants refused to accept the 37 average count Chinese shelled peanuts tendered by plaintiff, but deny that after notice of a time and place, or time or place of sale, or at all, plaintiff sold said peanuts for the account of defendants, or at all, receiving therefor the full market price thereof, or at all. These defendants have no information as to the net proceeds of said alleged sale, and placing their denial upon that ground deny that the net proceeds of said alleged sale was the sum of fifteen thousand five hundred (15,500.00) dollars, or any other sum or at all. Deny that the excess of the amount due from defendants, or any amount due from the

defendants under said contract, or at all, over the net proceeds, or any proceeds, or at all of said sale is the sum of eight thousand five hundred (\$8,500) dollars, or any other sum, or at all.

And by way of further answer to both alleged causes of action set forth in plaintiff's complaint, these defendants allege:

### I.

That under the terms of the contract entered into between plaintiff and defendants, the merchandise to be delivered was Chinese shelled peanuts, 40 count average. Seattle Chamber of Commerce Certificate of Inspection final as to crop, count, quality and condition. [17]

### II.

That plaintiff on or about the twenty-second day of March, 1920, did tender to the defendants an invoice specifying that the count of the sixteen hundred (1600) bags of Chinese shelled peanuts were of 38/40 count, and the count of four hundred (400) bags Chinese shelled peanuts were 38/40. Defendants upon inspection of the Seattle Chamber of Commerce Certificate did discover that the one thousand four hundred forty (1440) bags of the sixteen hundred (1600) bags were not 38/40 count, but 37 count average.

### III.

That immediately upon obtaining said information said defendants did offer to accept the five hundred sixty (560) bags of the 38/40 count, and did offer to pay for same *by* that plaintiff

without right or cause did refuse to deliver said five hundred sixty (560) bags of 38/40 count.

#### IV.

That defendants have been at all times able, ready and willing to accept and pay for Chinese shelled peanuts 40 count average under their contract, but that plaintiff has failed and refused to tender said peanuts.

And by way of further and separate defense to both causes of action of plaintiff's complaint, these defendants allege:

That after inspection of the Seattle Chamber of Commerce Certificate that one thousand four hundred and forty (1440) bags of the two thousand (2000) bags contracted for were of the 37 count and not in accordance with the contract, these defendants did notify plaintiff that they were ready and willing to accept 37 count peanuts on a proper adjustment, but that plaintiff refused to enter into an agreement of adjustment, and did notify defendants that they must accept and pay for the 37 [18] count peanuts as being in full compliance by plaintiff of its contract on its part.

And by way of further and separate defense to both causes of action of plaintiff's complaint, these defendants allege:

That any damage suffered by plaintiff by reason of the contract entered into on the 28th day of November, 1919, between the plaintiff and the defendants was caused by plaintiff's refusal to tender peanuts within the terms of the contract and by



its own acts, and that plaintiff has suffered no damage whatsoever by reason of any act of the defendants.

WHEREFORE, defendants pray that plaintiff take nothing by this action and that they be hence dismissed with their costs.

JOHN S. PARTRIDGE,  
RAYMOND PERRY,  
Attorneys for the Defendants.

State of California,  
City and County of San Francisco,—ss.

Harry Kockos, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action and matter, and makes this verification for and on behalf of said defendants; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

HARRY KOCKOS.

Subscribed and sworn to before me this 14th day of May, 1921.

[Seal] MARY D. F. HUDSON,  
Notary Public in and for the City and County of  
San Francisco, State of California. [19]

Receipt of a copy of the within answer is admitted this 14th of May, 1921.

BROWNSTONE & GOODMAN,  
Attorneys for Plaintiff.



[Endorsed]: Filed May 14, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

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At a stated term, to wit, the March term, A. D.  
1921, of the Southern Division of the United  
States District Court for the Northern Dis-  
trict of California, Second Division, held at  
the courtroom in the City and County of  
San Francisco, on Monday, the 16th day of  
May, in the year of our Lord one thousand  
nine hundred and twenty-one. Present: The  
Honorable WILLIAM C. VAN FLEET, Dis-  
trict Judge.

No. 16,454.

C. ITOH & CO., Ltd.,

vs.

HARRY KOCKOS,

**(Order Granting Defendants' Motion to Set Aside  
Attachment.)**

Defendant's motion to set aside attachment came  
on to be heard and after arguments being sub-  
mitted it was ordered that said motion be and the  
same is hereby granted. [21]

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(Title of Court and Cause.)

**Verdict.**

We, the jury, find in favor of the plaintiff and

assess the damages against the defendants in the sum of eighty-five hundred and 00/100 dollars.

J. M. MENDELL,  
Foreman.

[Endorsed]: Filed June 7, 1922. Walter B. Maling, Clerk. [22]

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(Title of Court and Cause.)

### **Judgment on Verdict.**

This cause having come on regularly for trial upon the 6th day of June, 1922, being a day in the March, 1922, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; L. H. Brownstone and L. E. Goodman, Esqrs., appearing as attorneys for plaintiff and John S. Partridge and Raymond Perry, Esqrs., appearing as attorneys for defendants; and the trial having been proceeded with on the 7th day of June in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of eighty-five hundred and 00/100 dollars. J. M. Mendell, Foreman," and the Court having ordered that judgment be

entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that C. Itoh & Co., Ltd., a corporation, plaintiff, do have and recover of and from Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros. and Kockos Bros., a partnership, defendants, the sum of eighty-five hundred and 00/100 (\$8500.00) dollars, together with its costs herein expended taxed at \$266.30.

Judgment entered June 7, 1922.

WALTER B. MALING,

Clerk. [23]

A true copy.

[Seal] Attest: WALTER B. MALING,

Clerk.

[Endorsed]: Filed June 7, 1922. Walter B. Maling, Clerk. [24]

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(Title of Court and Cause.)

**Clerk's Certificate to Judgment-Roll.**

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

26 *Harry Kockos and Andrew Kockos et al.*

Attest my hand and the seal of said District Court this 7th day of June, 1922.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed June 7th, 1922. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,454.

C. ITOH & CO., a Corporation,

Plaintiff,

vs.

HARRY KOCKOS and ANDREW KOCKOS, Co-partners Doing Business Under the Firm Name and Style of KOCKOS BROS., and KOCKOS BROS., a Partnership,  
Defendants.

**Defendants' Engrossed Bill of Exceptions.**

BE IT REMEMBERED that heretofore and after issue properly joined, the above-entitled cause came on for trial before the said Court at a stated term thereof, holden in the City and County of San Francisco, State of California, in the Southern Division of said United States District Court, in

and for the Northern District of California, Second Division, and on, to wit, the 6th day of June, 1922, then and thereon a jury was duly and regularly impanelled and sworn to try the said cause and on said day and the succeeding day of June 7th, 1922, oral and documentary evidence were presented on behalf of the said plaintiff and on behalf of the said defendants and that the following proceedings, and none other, were had upon the hearing and trial of the said cause:

Mr. Brownstone, attorney for plaintiff, read the depositions of R. A. Crandall, George B. Graham, Arthur U. Pinkham, L. W. Ilitson, George A. Jensen, G. A. Pande, Arthur E. Campbell and Adrian H. De Young. [26]

**Deposition of R. A. Crandall, for Plaintiff.**

R. A. CRANDALL, a witness for plaintiff, being first duly sworn, deposed and said as follows:

I reside in Seattle. I am supercargo for the N. Y. K. Steamship Company. During the year 1920 I was traffic manager for C. Itoh & Company, Ltd. Mr. N. Nahamura was manager.

(The following document was identified by the witness as a contract between C. Itoh & Company, of Seattle, and Kockos Bros. of San Francisco.)



**Plaintiff's Exhibit No. 1.**

"C. ITOH & CO., LTD.,  
Exporters and Importers,  
Central Building.

Seattle, Wash., November 28, 1919.

**MERCHANDISE CONTRACT.**

**BUYERS:** Kockos Bros., San Francisco, California.

**SELLERS:** C. Itoh & Co., Ltd., Seattle.

**MERCHANDISE:** Chinese Shelled Peanuts, 40  
count (Average).

**QUANTITY:** Approximately One Hundred (100)  
Tons.

**QUALITY:** 1919 Crop F. A. Q. of the Season's  
crop.

**TIME OF DELIVERY:** December/January from  
the Orient.

**PLACE OF DELIVERY:** Seattle, Washington.

**PRICE:** 12¢ per pound F. O. B. Cars, duty paid.

**TERMS:** Sight Draft against Railroad Bill of Lad-  
ing (Collection charges for Buyer's account).

**WEIGHT:** Seattle Net Re-weights.

**REMARKS:** Seattle Chamber of Commerce Certi-  
ficate of Inspection final as to Crop, Count,  
Quality and Condition.

This sale is based on present United States Customs House Classification, any change in same being for buyer's account. Sellers are not responsible for non-delivery or delay of delivery, nor for any damage or loss resulting directly or indirectly from acts of God, perils of the sea, restrictions imposed by any Government, State

or Government authority, strikes, riots, fires, floods, accidents, epidemics, war insurrections, lock-outs, break-downs of machinery, shipping restrictions, embargoes, commandeering of vessels or from any causes beyond control of seller at any time. Such delay, however, shall not excuse buyers from accepting delayed delivery. In no case shall seller be responsible after delivery of goods in good condition to carrier at place designated in contract.

All war or excise taxes levied or assessed, after date of this contract in any way affecting this sale of said goods, are for buyers account.

KOCKOS BROS.,

By ANDREW KOCKOS,

Buyers.

C. ITOH & CO., LTD.,

By N. NAKAMURA,

Sellers.

A. U. PINKHAM & CO.,

By A. U. PINKHAM, Broker. [27]

The document was admitted as Plaintiff's Exhibit No. 1.

The witness then identified the following document, which was then admitted in evidence as Plaintiff's Exhibit No. 2:

**Plaintiff's Exhibit No. 2.**

A. U. PINKHAM & CO.

Incorporated.

Colman Building.

Seattle, U. S. A.

Nov. 28, 1919.

C. Itoh & Co.,

Central Building,

Seattle, Wash.

Gentlemen:

We beg to confirm sale of the following merchandise under the terms and conditions below recited; namely:

SELLERS: C. Itoh & Co., Seattle.

BUYERS: Kockos Bros., San Francisco.

ARTICLE: Chinese Shelled Peanuts, 40 count,  
purchased as 38/40's by sellers.

QUANTITY: One hundred (100) tons.

QUALITY: F. A. Q. season 1919, Seattle Chamber  
of Commerce certificate to be final.

SHIPMENT: December-January from Orient.

PRICE: Twelve Dollars (\$12.00) f. o. b. cars  
Seattle, duty paid.

WEIGHTS: Net re-weights.

TERMS: Sight draft against shipping documents.

BROKERAGE: One percent (1%) to A. U. Pink-  
ham & Co.

REMARKS: Sale made on proviso shipping instructions given in order that seller may obtain absorption allowance from railroad.

Yours very truly,

A. U. PINKHAM & CO., INC.

Per A. U. PINKHAM,

Pres.

JG/LJ.

The witness then identified the following document which was then admitted in evidence as Plaintiff's Exhibit No. 3: [28]

**Plaintiff's Exhibit No. 3.**

A. U. PINKHAM & CO.

Incorporated.

Colman Building,

Seattle, U. S. A.

December 6, 1919.

Messrs. C. Itoh & Co., Ltd.,

Central Building,

Seattle, Wash.

Gentlemen:

We return herewith your Merchandise Contract, dated November 28th, covering sale of 100 tons Chinese Shelled Peanuts, which has been duly signed by the buyer, Kockos Brothers, San Francisco.

Yours very truly,

A. U. PINKHAM & CO., INC.

Per A. U. PINKHAM,

Pres.

GK.

(Deposition of R. A. Crandall.)

The witness then proceeded as follows:

As I recall the peanuts called for in the contract, Exhibit 1, arrived in Seattle the latter part of February or 1st of March. I do not know whether the Seattle office notified Kockos Bros. about Feb. 19, 1920, of the date arrival of eighty tons of these peanuts.

The witness then identified the following document, which was offered in evidence as Plaintiff's Exhibit No. 4:

**Plaintiff's Exhibit No. 4.**

C. ITOH & CO., LTD.

Exporters and Importers.

Central Building,

Seattle, Wash., February 19, 1920.

Messrs. Kockos Bros.,

San Francisco, California.

Gentlemen:

We are in receipt of a cable from our Kobe office advising that they shipped under date of January 31st ex S. S. "Eastern Victor" Eighty tons Chinese Shelled peanuts 40 count to apply on your contract with us dated November 28th, for 100 tons.

The "Eastern Victor" is due to arrive here on or about March 1st, and we ask that you send us shipping instructions as soon as possible.

Very truly yours,

C. ITOH & CO., LTD.,

By N. NAKAMURA. [29]

N/MC.



(Deposition of R. A. Crandall.)

The witness then identified the following document, which was offered in evidence as Plaintiff's Exhibit No. 5:

**Plaintiff's Exhibit No. 5.**

“WESTERN UNION TELEGRAM.

1920 Mar 2 PM 5 25.

A445 EA 20 Nite

Seattle Wash 2

Kockos Bros

1733

40 California St

San Francisco Calif

Hundred tons peanuts to cover your contract dated November twenty eighth arrived today Ex Eastern Victor Wire us shipping instructions

C. ITOH AND CO., LTD.”

The witness proceeded as follows:

H. L. Hudson & Co., formerly located in Seattle, asked us for permits to inspect the peanuts for Kockos Bros. We sent them the permits. (The witness identified the following document which was offered in evidence of Plaintiff's Exhibit No. 6.)

**Plaintiff's Exhibit No. 6.**

“March 9, 20.

H. L. Hudson & Company,

Hoge Building,

Seattle, Washington.

Gentlemen:

Referring to purchase of Kockos Bros., San Fran-

cisco, California, of one hundred tons Chinese Shelled peanuts, forty count;

We are herewith handling you sampling permits on East Waterway Dock covering entire lot. You will be able to obtain the amount of sample you desire.

Kindly furnish us disposition as soon as possible.

Very truly yours,

C. ITOH & CO., LTD.,

By \_\_\_\_\_.

ARC/MC

Enc.”

The witness then identified the following document as a copy of one of the permits sent to H. L. Hudson & Co. with the above letter, which permit was offered in evidence as Plaintiff's Exhibit No. 7:  
[30]

**Plaintiff's Exhibit No. 7.**

“J. T. STEEB AND COMPANY, INC.

211 White Building,

Seattle Wn.

File —

Samples—5 lbs.

Honorable Collector of Customs,

Seattle, Wash.

Dear Sir:

I, A. Freeborn Atty. in Fact, hereby make application for sample of the following merchandise

(Deposition of R. A. Crandall.)

prior to entry under article 223, Customs Regulations 1915, T. F. 37374, Paragraph 106.

Imported for

Use of

| STEAMER.       | LADING NO.   | MARKS.             | QUANTITY. | CONTENTS.        |
|----------------|--------------|--------------------|-----------|------------------|
| Eastern Victor | Kobe/Seattle | <u>&lt;ITC&gt;</u> | 1600 Bags | Shelled peanuts. |

B 13

Seattle

118#

J. T. STEEB AND CO. INC.

By A. FREEBORN,

Atty. in Fact.

We hereby consent to the above sampling.

C. ITOH AND COMPANY LTD.

By N. NAKAMURA,

Assistant Manager,

Holder of Bill of Lading.

We hereby concur the above request.

MITSUBISHI GOSHI KAISHA,

Seattle Agency.

R. H. CIBBIK,

Carrier.

To the Inspector:

Please allow above.

(Seal)

CHAS. WILKINSON,

Deputy Collector."

The witness proceeded as follows: I also sent H. L. Hudson & Co., a permit to inspect a shipment of 400 bags marked—Three Stars. We had received no instructions from Kockos Bros. up to March 12, 1920, when we wrote the letter to the National Importing and Trading Co., sending them inspection permits in these two lots of peanuts.

(Deposition of R. A. Crandall.)

The National Importing & Trading Co. had an office in Seattle at that time. I secured a sample permit for them to inspect the permits on their request as they said they had bought the peanuts described in Plaintiff's Exhibit 1 [31] from Kockos Bros. and desired to inspect and sample the goods before they accepted them. On March 15th, 1920, I telegraphed Kockos Bros. for shipping instructions, as follows:

**Plaintiff's Exhibit No. 9.**

Seattle, Wash., March 15, 1920.

Kockos Bros.,

40 California Street,

San Francisco, Cal.

Referring to our wire March second advising you of arrival of Hundred tons peanuts to cover your contract dated November twenty eighth and asking that you wire us shipping instructions to date shipping instructions have not been received Unless they are furnished immediately it will be necessary that we place this shipment in storage at your expense

C. ITOH & CO. LTD.

302 Central Bldg. Seattle.

(Paid, Chg. C. Itoh & Co. Ltd.)

302 Central Bldg."

In answer we received the following telegram:

**Plaintiff's Exhibit No. 10.**

"A31EA AM 42 Blue

Md San Francisco Calif 1038 AM Mar 17 1920.

C Itoh and Co

Central Bldg Seattle Wash

Replying to your communication hundred tons thirty eight forties we regret this delay but we trying to get shipping instructions from our buyers East No doubt we will have same within day or so Try hold shipment at dock to save unnecessary expense.

KOCKOS BROS.

107 PM."

On the same day we received the following telegram:

**Plaintiff's Exhibit No. 11.**

"239 sfs 25 1229p

SA San Francisco Cal Mar 17 20

C. Itoh and Co.

Central Bldg Seattle

Ship hundred tons peanuts Kockos brothers Chicago Notify Natl Importing Trading Co Phone them They probably will change shipping instructions This satisfactory to us Advise.

KOCKOS BROS."

In compliance with the telegram we asked the National Importing & Trading Co. for shipping instructions. I had prior to this time delivered inspection permits to the National Importing & Trading Co. Three or four days later I saw in-



spection certificates received by the National Importing & Trading Company. About March 17 or 18, 1920, we received the following letter from them: [32]

**Plaintiff's Exhibit No. 12.**

"March 17, 1920.

C. Itoh & Co., Ltd.,  
Central Bldg.,  
Seattle.

Dear Sirs:

We wish to thank you for your letter of March 17, offering sixty five (65) barrels China Wood Oil, now spot Seattle. We will take this up with our eastern office, sending them copies of the Wor-stall test. We will hold the originals on file here to forward in case sale is made.

We further wish to confirm the writer's conversation with you today, in which we instructed you to ship one hundred (100) tons Chinese Shelled Peanuts, on which we have Chamber of Commerce certificates. You are to ship, notify National Importing & Trading Co., 30 No. Dearborn St., Chicago, Illinois, cars to go to Sibley Warehouse, Clarke Street Bridge.

Very truly yours,

NATIONAL IMPORTING & TRADING  
CO. INC.

A. H. DeYOUNG,  
Vice-President."

AHD/AH.

I had seen the Chamber of Commerce certificates before I received this letter. I had a conversation

with Mr. DeYoung, manager of the Seattle office of the National Importing & Trading Company on or about the date I received the letter of March 17th and he said the nuts were very good and did not say that there was any objection to the peanuts or to the Chamber of Commerce certificates they had obtained with the peanuts. The following are copies of the Chamber of Commerce certificates:

**Plaintiff's Exhibit No. 13-A.**

“Seattle Chamber of Commerce and Commercial Club.

Foreign Trade Bureau.

Seattle, Washington, March 15, 1920.

Certificate No. 10555.

At the request of National Importing & Trading Co., Seattle, Wash., this Bureau has selected I. F. Laucks, Inc., to sample and inspect 1600 Bags shelled Peanuts Marked: Ex ‘Eastern

CTC

Victor’

#118

Stored at East Waterway Dock Kobe B/L 3, C. E. 5345, for account of National Importing & Trading Co.

---

Director Foreign Trade Bureau.

We have inspected the 1600 Bags Peanuts described above and certify: [33]

40 *Harry Kockos and Andrew Kockos et al.*

That the quality is

Chinese Shelled Peanuts Count 36-38.

Free from mold and vermin.

In sound merchantable condition.

These peanuts fair average quality, 1919 crop.

Containers in good condition.

Weight 100-lbs. per sack, net.

Date of Sampling —.

Per cent. Sampling —.

File Copy for C. Itoh.

Inspector, I. F. LAUCKS, INC.

By \_\_\_\_\_.

We attest that the above signature is the true signature of the above-named I. F. Laucks, Inc.

\_\_\_\_\_  
Director Foreign Trade Bureau.

Copy.

**Plaintiff's Exhibit No. 13-B.**

“Seattle Chamber of Commerce and Commercial Club.

Foreign Trade Bureau.

Seattle, Washington, March 13, 1920.

Certificate No. 10556.

“At the request of National Importing & Trading Co., Seattle, Wash., this Bureau has selected I. F. Laucks, Inc., to sample and inspect 560 Bags Peanuts Marked \* \* \* Ex. Ex/ ‘Eastern

40

Ocean.’

Stored at East Waterway Dock C. E 4822

(Deposition of R. A. Crandall.)

Kobe B/L 29, for account of National Importing & Trading Co.

---

Director Foreign Trade Bureau.

We have inspected the 560 Bags Peanuts described above and certify:

That the quality is Chinese shelled peanuts.

Count 38-40.

Free from mold and vermin.

In sound merchantable condition.

These peanuts fair average quality, 1919 crop.

Containers in good condition.

Weight 100 lbs. per sack, net.

Date of Sampling.

Inspector, I. F. LAUCKS, INC. [34]

Per cent. Sampling

By \_\_\_\_\_.

We attest that the above signature is the true signature of the above named I. F. Laucks, Inc.

---

Director of Foreign Trade Bureau.

Copy.

(Seal F. I. Laucks, Inc.)

to C. ITOH."

At the time I received this letter of March 17th from the National Importing & Trading Company I had no intimation that there was any objection to the nuts. Kockos Bros. had previously made a request for inspection of the peanuts through H. L. Hudson and Co. and at that time there was no objection from either Kockos Bros. or the National

42 *Harry Kockos and Andrew Kockos et al.*

Importing and Trading Co. to the peanuts or the inspection certificates. Shortly after receiving shipping instructions from the National Importing and Trading Co. we ordered the nuts shipped.

We sent the following request for weights to Jordan & Company:

**Plaintiff's Exhibit No. 14.**

March 17, 1920.

Jordan & Company,  
Grand Trunk Dock,  
Seattle, Washington.

Gentlemen:

We have given the Great Northern and East Waterway Dock shipping instructions on the following lots of peanuts:

1600 Bags shelled Peanuts ex 'Eastern Victor'  
Marked:

$\frac{\langle \text{ITC} \rangle}{118}$   
Seattle

400 Bags Shelled Peanuts ex 'Eastern Ocean'  
Marked: \* \* \*

Will you please let us have weight certificates, in quadruplicate, on these two lots on net weight per sack basis.

Very truly yours,

C. ITOH & CO. LTD.,

By \_\_\_\_\_."

The following is a letter we sent to East Waterway Dock & Warehouse Co. regarding the nuts.



**Plaintiff's Exhibit No. 15.**

“March 17, 1920.

East Waterway Dock & Warehouse Co.,

Seattle, Washington.

Gentlemen:

S. S. ‘Eastern Victor’

S. S. ‘Eastern Ocean.’

Herewith handing you Mitsubishi's Delivery Order, without number, on 1600 Bags Chinese Shelled Peanuts ex S. S. ‘Eastern Victor,’ Kobe/Seattle B/L #3, marked:

ITC  
118  
Seattle

Also Rogers Brown & Co's. Delivery Order No. 1059 covering 400 Bags Shelled Peanuts ex ‘Eastern Ocean,’ Marked: \* \* \*

together with copies of Rail Bills of Lading furnished to the Railroad Company upon which to load this shipment. Jordan & Company to weigh before loading.

Inasmuch as this shipment has been delayed we would appreciate it very much if you would kindly render all assistance possible in getting same moving.

All charges are to be taken care of by this office. Please render your bills in triplicate.

Very truly yours,

C. ITOH & CO. LTD.,

By \_\_\_\_\_.”

We sent the following letter to W. F. Stokes regarding the nuts:

**Plaintiff's Exhibit No. 16.**

March 17, 20.

Mr. W. F. Stokes, Agent,  
Great Northern Dock,  
Seattle, Washington.

Dear Sir:

S. S. 'Eastern Victor.'

S. S. 'Eastern Ocean.'

We are herewith enclosing our Bills of Lading numbered 53 to 56, inclusive, covering 2000 bags of Chinese, Shelled peanuts ex 'Eastern Victor' and 'Eastern Ocean,' now at East Waterway Dock, consigned to our order/notify National Importing & Trading Company, c/o Sibley Warehouse, Clarke Street Bridge, Chicago. [36]

While each of these Bills of Lading are made out for a specified amount, it is immaterial to us as to the number of bags loaded in each car as long as you protect the minimum carload rate on each car. We are giving you this information for the reason that it will enable you to perhaps, utilize cars to a better advantage. You, of course, realize that the East Waterway Dock is located on the O. W. R. & N., which is at this time a direct competitor of yours, and we trust you will use every possible effort to get this shipment moving at once. Jordan & Company is to weigh shipment before loading.

No charges of any nature are to be advance against these shipments.

Very truly yours,

C. ITOH & CO. LTD.,

By \_\_\_\_\_.

ARC/MC.

Enc."

The nuts were weighed and then we prepared a draft for the purchase price and the weight certificate, Chamber of Commerce certificates and the Bills of lading were attached thereto and taken to the bank.

The following is a duplicate of the invoice accompanying the draft:

**Plaintiff's Exhibit No. 17.**

"C. ITOH & COMPANY, LTD.

Date March 22, 1920.

Sold to Kockos Bros.,

San Francisco, Cal.

S-14

P-112-117

|                                   |       |         |         |     |            |
|-----------------------------------|-------|---------|---------|-----|------------|
| 1600 Bags Chinese Shelled Peanuts |       |         |         |     |            |
| 38/40 Count                       | Gross | 162905# |         | at  |            |
|                                   | Tare  | 2800#   | 160105# | 12¢ | \$19212.60 |

ITC

118

|                                  |       |        |        |     |                  |
|----------------------------------|-------|--------|--------|-----|------------------|
| 400 Bags Chinese Shelled peanuts |       |        |        |     |                  |
| 38/40 Count                      | Gross | 40470# | 39270# | 12¢ | 4712.40          |
|                                  | Tare  | 1200#  |        |     |                  |
|                                  |       |        |        |     | <hr/> \$23925.00 |

We are attaching hereto the following:

Original and Duplicate of Railroad Bills of Lading numbered 53 to 56 inclusive, Great Northern Numbers 3151, 3152, 3153 and 3368. [37]

Weight Certificates, in duplicate, Copy of Seattle  
Chamber of Commerce Certificate of Inspection  
(Original delivered to National Importing &  
Trading Co.)

Draft #14, through Yokohama Specie Bank.

C. ITOH & COMPANY LTD.,

By N. NAKAMURA,

Assistant Manager."

The draft was drawn against Kockos Bros. for  
\$23,925.00, computed according to the weights and  
the purchase price.

I then notified Kockos Bros. of the shipping and  
draft by the following letter:

**Plaintiff's Exhibit No. 18.**

March 27, 20.

Messrs. Kockos Bros.,  
40 California Street,  
San Francisco, California.

Gentlemen:

Referring to your purchase of November 28th  
covering one hundred tons forty count Chinese  
Shelled peanuts, also your telegram of March  
17th instructing that these be shipped to Chicago  
to the National Importing & Trading Company:

We beg to advise that the entire lot has gone  
forward and we are drawing on you today through  
the Yokohama Specie Bank as per contract, col-

lection charges for your account, if any with all documents attached.

Very truly yours,

C. ITOH & CO., LTD.,

By \_\_\_\_\_.

ARC/MC.”

They declined to lift the draft.

About March 30, 1920, we received the following telegram from Kockos Bros:

**Plaintiff's Exhibit No. 19.**

“F Room 1, Lobby Central Bldg., Seattle, Wash.  
Tel. Main 7281—Local 19.

Open 9 A. M. to 5 P. M. Closed Sunday.  
A65EA An 64 Coll Blue via K

Md San Francisco Calif 6 PM Mar 30 1920.  
Messrs C. Itoh and Co.

Seattle Wash. [38]

Received your documents We regret they show sixteen hundred bags Thirty six thirty eights should be thirty eight forties Buyers very technical now days therefore we must have deduction Peanuts must be exact count which we bought Furthermore Phone our broker H L Hudson Let them see lading date Have them wire us immediately five hundred sixty bags in order with contract Answer.

KOCKOS BROS.

510 PM.”

We had received no intimation from Kockos Bros. that the count of 36/38 was unsatisfactory before this.



The draft on Kockos Bros. was protested. The following is a notice of protest which we received by mail:

**Plaintiff's Exhibit No. 20.**

“UNITED STATES OF AMERICA.

San Francisco, Cal., April 1st, 1920.

Sir:

Please take notice that a certain Sight Draft No. 14 dated Seattle Wash. March 27-1920, for \$23,925.00 Dollars, Payable at sight drawn by C. Itoh and Company Ltd. on Messrs Kockos Bros. 40 California St. San Francisco in favor of The Yokohama Specie Bank Ltd. was this day protested by me for the non-payment thereof, and the holders look to you for the payment thereof, together with all costs, charges, interests, expenses and damages already accrued or that may hereafter accrue thereon by reason of the non-payment of said Sight Draft.

Very respectfully yours, etc.,

[Seal]

JAMES MASON,

Notary Public in and for the City and County of  
San Francisco, State of California.

To C. Itoh and Company, Ltd.,  
Seattle, Washington.”

We replied to Kockos Brothers' telegram on April 1st, 1920, as follows:

**Plaintiff's Exhibit No. 21.**

“Seattle, Wash. April 1, 1920.

Kockos Bros.,

40 California St.,

San Francisco, Cal.

Exchange wires with reference to your purchase of hundred tons forty count peanuts no good reason why we should make any reduction in invoice covering these nuts you had inspected by several different parties and acknowledged acceptance when you instructed us to ship to Chicago We understand that the present [39] difficulty has nothing to do with grade of nuts in question Hudson and Company may see bill lading.

C. ITOH & CO., LTD.,

When we said in the telegram “You had these nuts inspected by several different parties,” we meant the National Importing and Trading Co., and H. L. Hudson and Co., as we had delivered the certificates to H. L. Hudson and Co.

About April 6, 1920, we received the following telegram in reply from Kockos Bros:

**Plaintiff's Exhibit No. 22.**

“A39EA AM 86 Coll Blue Via K

Md San Francisco Calif 1053 AM April 6 1920.

C Itoh and Co

Central Bldg Seattle Wash

Your wire April first not satisfactory We have purchased from you average Chamber Commerce certificate to be final as to count and quality Your

certificate shows thirty six thirty eight therefore cannot accept We understand goods rolling Chicago Would like to help you out all we can in this matter but you see your position You have not given us documents to comply with your contract We will not hold ourselves responsible on this shipment on account you failing to comply with your contracts.

KOCKOS BROS.

125 PM''

About April 9, 1920, we replied to this telegram as follows:

**Plaintiff's Exhibit No. 23.**

"Seattle, Wash. April 9, 1920.

Messrs. Kockos Bros.,

40 California St.,

San Francisco, Cal.

Your wire sixth referring your purchase sixteen hundred bags peanuts inasmuch as you were aware some six or eight days before giving us instructions that peanuts were of a higher count than thirty eight forty we feel that the matter of price should be submitted to arbitration you to name one arbitrator we one and the two one making arbitration board of three Will you name your arbitrator.

C. ITOH & CO. LTD.

(Paid, Chg. C. Itoh & Co. Ltd.)

302 Central Bldg."

Although we suggested that the matter be submitted to arbitration they did not express their

willingness to do so. On April 13, 1920, we sent the following telegram to Kockos Bros. outlining our position: [40]

**Plaintiff's Exhibit No. 24.**

"B224EA 95 Blue 1170.

F Seattle was 535 P 13.

Kockos Bros.,

40 California St., San Francisco, Calif.

Our position is that contract November twenty-eighth, nineteen nineteen, for one hundred tons Chinese peanuts have been fully performed by us, and in addition that both yourselves and your buyer National Importing Trading Company had inspected and passed peanuts previous to giving us shipping instructions. Stop Our telegraphic offer April ninth of arbitration has been ignored by you. Stop Therefore unless you promptly honor drafts we will have no alternative except to dispose of the peanuts for your account and bring action against you for all loss sustained. Must have reply within forty eight hours.

C ITOH AND CO LTD."

On or about April 15th we received the following reply from Kockos Brothers:

**Plaintiff's Exhibit No. 25.**

"19 SF 74 NL

San Francisco, Calif., 714

Messrs. C. Itoh & Co.,

Seattle, Wash.

Your wire thirteenth received. As per previous communications we have been able ready and will-

(Deposition of R. A. Crandall.)

ing to confirm our contract and accept documents according to terms of contract but you have absolutely failed to comply as your certificate self explains. Stop We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once.

KOCKOS BROS."

The peanuts described in the foregoing telegrams were the same ones for which we had furnished inspection permits to H. L. Hudson & Co. and to National Importing & Trading Co. and on which the National Importing & Trading Co. had received Chamber of Commerce certificates. To the best of my knowledge duplicates of the Chamber of Commerce certificates delivered to the National Importing and Trading Co. accompanied the draft drawn on Kockos Bros.

The draft for \$23,925.00 was never paid by Kockos Bros. nor have they paid for the peanuts.

After the last telegram to Kockos Bros., the peanuts had arrived in Chicago, and the Railroad Co. asked for immediate disposition of them, and we advised the Railroad Co. to put the peanuts in storage there. The peanuts had been forwarded to Chicago by us in accordance with the shipping instructions received.

We tried to dispose of the peanuts and asked A. U. Pinkham & Co. and W. R. Grace & Co., both of Seattle, for bids. We were not able to dispose of them immediately. During the period from March 15th to May 20th, 1920, the market



(Deposition of R. A. Crandall.)

price of peanuts was falling. [41] I was familiar with the daily market price of peanuts. The peanuts were stored in the Chicago Cold Storage Company Warehouse and sold May 20, 1920, to W. R. Grace & Co. We received a gross price of \$19,-528.86 or \$9.75 per hundred pounds. We had to pay \$3432.11 freight charges. The following four freight bills cover the freight charges to Chicago:

### Plaintiff's Exhibit No. 26.

"To UNITED STATES RAILROAD ADMINISTRATION, Director General of Railroads, Chicago, Burlington & Quincy Railroad, Dr., for charges on articles Transported:

CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.

4/27/20

Consignee CHICAGO COLD STORAGE CO. Freight Bill No. 70705  
Destination 16th & Indiana.

Route GN M TER CBQ CHGO ST CHAS AIR LINE

|                 |                 |                   |              |
|-----------------|-----------------|-------------------|--------------|
| Way-Billed from | Way-Bill date   | Full name of      | Car initials |
| GN SEATTLE      | and No.         | shipper           | & No.        |
| DOCKS WN        | F 1191 3/19     | EX ORIENT         | 202106 CP    |
| Point and Date  | Connecting Line | Previous Way-Bill |              |

|             |                 |             |
|-------------|-----------------|-------------|
| of shipment | Preference      | References  |
| DL BL       | 3152 ITCH EX SS | VICTOR KOBE |
|             | BL3             | EWWDK & WCO |

|  |        |      |         |          |
|--|--------|------|---------|----------|
| Number of packages, articles and marks | Weight | Rate | Freight | Advances |
|--|--------|------|---------|----------|

M 500 BAGS CHINESE  
SHELLED PEANUTS

ITC

51460 150 771 90

118

23 16 WAR TAX

NOT 4/5 1 C/L 500 BAGS

78 00 WAR TAX

REL 4/21 NOT IN BOND CE

5345

2 34 WAR TAX

EWWD & W SEALS

2089/90

5 00 R/C CHGO

15 WAR TAX

89460 38000 51460

Grand Total

880 55

C. B. & Q. R. R.

PAID

May 5 1920

F. ARMSTRONG, AGT.

By S., Cashier

Chicago, Ill. [42]

54 *Harry Kockos and Andrew Kockos et al.*

To UNITED STATES RAILROAD ADMINISTRATION, Director  
General of Railroads, Chicago, Burlington & Quincy Railroad, Dr.,  
for charges on articles Transported:

CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.

4/27/20

Consignee CHICAGO COLD STORAGE Co. Freight Bill No. 72723

Destination 16th & Indiana.

Route GN M TER CBQ CHGO. ST CHAS AIR LINE

|                              |               |              |                  |
|------------------------------|---------------|--------------|------------------|
| Way-Billed from              | Way-Bill date | Full name of | Car initials     |
| GN SEATTLE                   | F 1547        | shipper EX   | & No.            |
| DOCKS WN                     | 3.26          | ORIENT DK BL | 90806 L & N      |
| Previous Way-Bill References |               |              | Original car     |
|                              |               |              | initials and No. |
| 3368 ITOH CO E OCEAN EWW     |               |              | DKES DK EX       |
| O & W JORDAN TERML 2         |               |              |                  |

Number of packages, articles

|   |                  |        |      |         |          |
|---|------------------|--------|------|---------|----------|
|   | and marks        | Weight | Rate | Freight | Advances |
| M | 400 BAGS CHINESE | 40180  | 150  | 602 70  |          |
|   | SHELLED PEANUTS  |        |      | 18 08   | WAR TAX  |
|   | * * *            |        |      |         |          |
|   | NOT 4/19         |        |      | 18 00   | C/S CHGO |
|   | REL 4/27         |        |      | 54      | WAR TAX  |
|   | 38/40            |        |      | 5 00    | R/C CHGO |
| 1 | C/L 400 BAGS     |        |      | 15      | WAR TAX  |

GRAND TOTAL

644 47

CLEARED FROM CUSTOMS 2 SLACKERS 30 LB EACH

EWWD & W SEALS 1229/30

C. B. & Q. R. R.

PAID

May 5 1920

F. ARMSTRONG, AGT

By S., Cashier

Chicago, Ill. [43]

To UNITED STATES RAILROAD ADMINISTRATION, Director  
General of Railroads, Chicago, Burlington & Quincy Railroad, Dr.,  
for charges on articles Transported:

CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.

4/28/20

Consignee CHICAGO COLD STORAGE CO. Freight Bill No. 71311  
Destination 16th & Indiana.

Route GN MPL CBQ CHGO ST CHAS AIR LINE

Way-Billed from Way-Bill date Full name of Car initials & No.

GN SEATTLE F 1190 shipper EX 3151

DOCKS WN 3/19 ORIENT DK BL NYC 246413

Previous Way-Bill References Original Car initials  
EX S S E VICTOR KOBE and No.

BL3EWWDK

Number of packages, articles Weight Rate Freight Advances  
and marks

M 600 BAGS CHINESE

SHELLED PEANUTS

ITC

61092 150 916 38

NOT 4/12 1 CL 118 600 BAGS 27 49 WAR TAX

REL 4/21 48 00 C/S CHGO

1 44 WAR TAX

NOT IN BOND CE 5345 5 00 R/C CHGO

EWWD & W SEALS 2093/4 15 WAR TAX

Grand Total

998 46

C. B. & Q. R. R.

PAID

May 5 1920

F. ARMSTRONG, AGT.

By S., Cashier

Chicago, Ill. [44]

# 56 *Harry Kockos and Andrew Kockos et al.*

"To UNITED STATES RAILROAD ADMINISTRATION, Director  
General of Railroads, Chicago, Burlington & Quincy Railroad, Dr.,  
for charges on articles Transported:  
CHICAGO, ILL. (Cor. Canal and Harrison Sts.), STATION.

4/27/20

Consignee CHICAGO COLD STORAGE CO. Freight Bill No. 71310  
Destination 16th & Indiana.

Route GN MPLS CBQ CHGO ST CHAS AIR LINE

Way-Billed from Way-Bill date Full name of Car initials  
GN SEATTLE shipper EX & No.

DOCKS WN F 1189 3/19 ORIENT DK BL 3153 152636

Previous Way-Bill References: ITCH EX SS E VICTOR  
KOBE BL 3

Number of packages, articles  
and marks

Weight Rate Freight Advances

M 500 BAGS CHINESE

SHELLED PEANUTS

ITC 118

50877 150 763 15

NOT 4/12

22 89 WAR TAX

REL 4/27

48 00 C/S CHGO

1 44 WAR TAX

NOT IN BOND CE 5345 EWW

D & W SEALS 2091/2

5 00 R/C CHGO

15 WAR TAX

Grand Total

840 63

C. B. & Q. R. R.

PAID

May 5, 1920

F. ARMSTRONG, AGT.

By S., Cashier

Chicago, Ill."

The storage charges at Chicago were approximately \$270.00. Weighing charges \$46.72, which was a re-weighing requested by the purchaser through W. R. Grace & Co. The sampling charges were one dollar and some odd cents. All the charges were incidental to the sale.

We had to pay 3% commission on the sale or \$185.87. It was paid to W. R. Grace & Co. It is the customary charge where the sale is made through two firms or two branches of the same firm. We received net from W. R. Grace & Co. for the sale, \$15,183.38. The following is an account sales sent with the remittance: [45]

**Plaintiff's Exhibit No. 27.**

“No. 9.

Account Sales of 1999 Bags Peanuts.

Received per Cars # N. Y. C. 245413; 152636 C. P.; 202106 L & N 90806.

For account and risk of Seattle House.

399 Bags sold to Durand & Kasper

Weight,—Gross—Tare—Net

40878 798 40080

at \$9.75 per 100#

3907.80

1200 Bags sold to Reid Murdock & Co.

Weight—Gross—Tare—Net

122881 2400 120481

at \$9.75 per 100#

11746.90

400 Bags Sold to Rogers Brown & Co.

Weight—Gross—Tare—Net

40355 600 39735

at \$9.75 per 100#

3874.16

Value May 20, 1920

---

19528.86



CHARGES.

|                             |        |          |
|-----------------------------|--------|----------|
| C. P.                       | 202106 | \$880.55 |
| Freight N. Y. C.            | 245413 | \$998.46 |
| C. P.                       | 152636 | \$840.63 |
| L & N                       | 90806  | \$712.47 |
| Weighing                    |        | 3432.11  |
| Storage and Sampling        |        | 46.72    |
| Commission \$19528.86 at 3% |        | 280.78   |
|                             |        | 885.87   |
|                             |        | 4345.48  |

Net Proceeds, Value June 15, 1920,

15183.38

Chicago

W. R. GRACE & CO.

Seattle, Washington.

June 22, 1920.

Received \$15183.38 in settlement of above.

C. ITOH & CO.

By \_\_\_\_\_,"

The following are the bills we received from the Chicago Cold Storage Warehouse Company for storage, sampling, weighing and freight: [46]

**Plaintiff's Exhibit No. 28.**

**"CHICAGO COLD STORAGE WAREHOUSE  
CO.**

Chicago, Ill., May 20th, 1920.

In Account with C. Itoh & Co.,

Seattle, Wash.

Accrued charges—Peanuts—Lots #486-487-489.

|         |           |     |     |
|---------|-----------|-----|-----|
| May 7th | Storage # | 387 | .90 |
|---------|-----------|-----|-----|

|          |         |      |  |
|----------|---------|------|--|
| May 18th | Storage | 1181 |  |
|----------|---------|------|--|

|                  |  |  |      |
|------------------|--|--|------|
| (Balance unpaid) |  |  | 3.05 |
|------------------|--|--|------|

|          |         |      |        |
|----------|---------|------|--------|
| May 21st | Storage | 1422 | 271.83 |
|----------|---------|------|--------|

|         |             |        |        |
|---------|-------------|--------|--------|
| May 4th | Freight Car | 152636 | 840.63 |
|---------|-------------|--------|--------|

|         |             |        |        |
|---------|-------------|--------|--------|
| May 4th | Freight Car | 245413 | 998.46 |
|---------|-------------|--------|--------|

|         |             |        |        |
|---------|-------------|--------|--------|
| May 4th | Freight Car | 202106 | 880.55 |
|---------|-------------|--------|--------|

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2,995.42

Received Payment, May 24, 1920.

**CHICAGO COLD STORAGE WAREHOUSE CO.**

Per V.

Cashiers Pay & Charge

Windsor Department

Lot No. —.

Initialed WECM"

60 *Harry Kockos and Andrew Kockos et al.*

“CHICAGO COLD STORAGE WAREHOUSE  
CO.

Chicago, 5/7/20.

C. Itah & Co.,

Seattle, Washington.

Order No. A-8632 Bill No. A-387

Del'd To A. U. Pinkham & Co.

Lot: Pkgs:

488 400

489 499 Sacks Peanuts

486 500

487 600

Drew samples only charges for 1 man 11½ hours at  
60¢ per .....90¢”

[47]

“CHICAGO COLD STORAGE WAREHOUSE CO.

Chicago, 5/18/20.

C. Itah & Co.,

Seattle, Washington.

Order No. A-8880. Bill No. A-1181. Del'd to  
Rogers Brown & Co. NTFY. Brundage Bros. Co.  
Via Pittsburg, Pa.

Car No. GT 25252 Seals A-861/62.

| Lot | Pkgs. | Article                                    | Weight | From   | To      | Mos. | Rate. | Amount. | Total. |
|-----|-------|--|--------|--------|---------|------|-------|---------|--------|
| 488 | 400   | Bags Peanuts                               | 39796  | 5/5/20 | 5/17/20 | 1    | 17    | 67.65   |        |
|     |       | Charge for 4 hours labor for weighing..... |        |        |         |      | 60    | 2.40    |        |
|     |       | Charge for 10 lbs. of paper.....           |        |        |         |      | 10    | 1.00    | 71.05” |

(Deposition of R. A. Crandall.)

“CHICAGO COLD STORAGE WAREHOUSE CO.

Chicago, 5/21/20.

C. Itoh & Company,

Seattle, Washington.

Order No. Cards Nill No. A 1422.

| Lot | Pkgs. | Article       | Weight | From   | To     | Mos. | Rate. | Amount. | Total. |
|-----|-------|---------------|--------|--------|--------|------|-------|---------|--------|
| 486 | 500   | Sacks peanuts | 50000  | 5/4/20 | 6/4/20 |      |       |         |        |
| 487 | 600   | “ “           | 60000  | 5/4/20 | 6/4/20 |      |       |         |        |
| 489 | 499   | “ “           | 49900  | 5/4/20 | 6/4/20 |      |       |         |        |
|     |       |               | 159900 |        |        | 1    | 17    | 271.83” |        |

In my opinion the price of \$9.75 per hundred pounds was the fair market price or value of the peanuts in Chicago at the time of sale.

The notation 36/38 and 38/40 means the number of the peanuts to the ounce. The 36/38's are slightly larger than the 38/40's. The 36/38's are the better commodity, being larger, and commands a higher price. [48]

#### Cross-examination.

I had nothing to do with the storage company in Chicago nor with the commission. I received the check from W. R. Grace & Co. and had something to do with the accounting.

I do not know personally whether samples were taken or not. I do know personally that the various bills were paid.

I personally made out the invoice of March 27, 1920, and knew at that time the peanuts were 36/38. I could not say now why the original did not specify that the peanuts were 36/38. I first ascertained that they were 36/38's during the first

(Deposition of R. A. Crandall.)

of March. It appears from the communications to Kockos Brothers that they were 38/40's.

The railroad company stored the goods in Chicago to the shipper's account. Only 400 bags of 38/40 count were ever tendered to Kockos Bros. I never gave Kockos Bros. any notice of the time and place of sale of these peanuts in Chicago, nor the name of the broker. I do not charge any fraud in the Chamber of Commerce certificate.

Kockos Bros. offered to receive and pay for the 400 bags of 38/40's but the offer was refused. They were notified to pay for the entire contract or pay damages.

#### Redirect Examination.

The freight bills were stamped and paid when I received them.

When I received the account sales from W. R. Grace & Co. I checked up and satisfied myself that all the deductions were correct. When the drafts were sent to Kockos Bros. with the Chamber of Commerce certificates procured by the National Importing and Trading Co., the certificates showed the 1600 bags were 36/38 count. When the drafts were forwarded to Kockos Bros. at San Francisco, there was no withholding of the larger count of peanuts in the 1600 bag lot. The Chamber of Commerce certificates attached to the draft showed exactly what the count was, and was available for the examination of the defendants when they examined the draft and the documents attached to it.



(Deposition of R. A. Crandall.)

On April 6th, 1920, Kockos Bros. refused to hold themselves responsible in any way on the shipment and we notified them April [49] 13, 1920, that we would sell for their account and sue them for any loss.

**Deposition of George B. Graham, for Plaintiff.**

GEORGE B. GRAHAM, a witness on behalf of plaintiff, being first duly sworn, deposed and said:

I am a member of the firm of O'Callahan-Graham & Co., importers and brokers, located at Seattle, Washington. I was a member of that firm in March 1920.

We had sold a good many peanuts as brokers for others, buy and sell on our own account and inspect peanuts for many people.

We were requested on March 10, 1920, by Kockos Bros. to inspect a hundred ton lot of peanuts for them. We received the sampling permit from the Hudson Co., customs brokers, and made the inspection. The peanuts were inspected in two lots, 1600 bags Ex "Eastern Victor" marked ITC in a diamond and 560 bags marked three stars Ex "Eastern Ocean." After the inspection we sent the following telegram to Kockos Bros.:

**Plaintiff's Exhibit No. 29.**

"March 10, 1920.

Kockos Bros.

46 California St.,

San Francisco, Cal.

Examined to-day two lots China shelled peanuts

(Deposition of George B. Graham.)

totaling hundred eight tons per your wire fifth Itoh shippers Sixteen hundred bags Ex Eastern Victor marked diamond ITC actual count thirty-seven sound clean evenly graded free from mold dirt or worms Excellent condition Exceptionally good delivery on forty count Contract lot five hundred sixty sacks Ex Eastern Ocean marked three stars Actual count thirty-nine clean free from worms webs or dirt Average two nuts slightly moldy out of six hundred twenty-five May not increase but don't like even slight trace Advise if want samples.

Collect.

O'CALLAHAN-GRAHAM CO."

The telegram is a true report of our inspection. We found the 1600 bags as shown by this telegram to actually contain a count of 37.

I considered the count of thirty-seven good delivery on a 40 count contract because they were larger than called for by the contract. Up to that time I never [50] heard of rejection of peanuts because larger than called for. Since then I have heard of such rejection. The 37 count is one peanut per ounce larger than the 38/40. I never heard of objections to larger nuts except when the market was falling.

We received the following letter from Kockos Bros. in reply to our telegram:

(Deposition of George B. Graham.)

**Plaintiff's Exhibit No. 30.**

"San Francisco, U. S. A., March 12, 1920.

Messrs. O'Callahan-Graham Co.,

Seattle, Wash.

Gentlemen:

We have received your wire of March 10th giving us full information in regard to inspection of 100 tons PEANUTS to ITOH & COMPANY which information was very clear to us and we thank you for your prompt inspection and answer.

We will communicate with you from time to time to give you some of this business, and in the meantime if you are interested in buying anything, kindly let us hear from you.

We remain,

Yours very truly,

KOCKOS BROS.,

By ANDREW KOCKOS,

AK:MD.

Import & Export Dept."

We were requested by and received compensation for our inspection from Kockos Bros. and we were never advised by them that they objected to the peanuts because of the count. We have no interest in the controversy. I was familiar with the peanut market between March 15 and June 1, 1920. It was a falling market.

**Cross-examination.**

On occasions inspectors will disagree as to count. I would not rely on the Chamber of Commerce certificate as to count. I say this because sometimes their certificates are wrong. [51]

(Deposition of George B. Graham.)

I am familiar with the sale of peanuts by count.

I am positive C. Itoh & Co. knew nothing of my work for Kockos Bros. during the month of March, 1920.

I am not sure just when the decline began in the market.

**Deposition of Arthur U. Pinkham, for Plaintiff.**

ARTHUR U. PINKHAM, a witness for plaintiff, first duly sworn, deposed and said:

I am in the firm of A. U. Pinkham & Co., Seattle, import and export brokers. I was so engaged in 1919 and 1920. We handled shelled peanuts and oriental products in general. Seattle is the principal office of the firm with a branch in Chicago and also in San Francisco opened about May, 1920.

I sent a copy of the contract in this case, together with a letter of confirmation and letter of transmittal heretofore introduced as Plaintiff's Exhibits 1, 2 and 3.

The contract calls for 38/40 count.

The number 36/38, 38/40 refers to the number of peanuts per ounce. The 36/38's are the larger and always bring a higher price. A 38/40 is a good delivery against 40's.

In March, April and May, 1920, I was handling peanuts as a broker and was familiar with the market price. Between the months of March and June 1, 1920, the market was steadily declining rapidly.

The market price of 36/38's in Seattle in March



(Deposition of Arthur U. Pinkham.)

1920 was for Chinese shelled peanuts, f. a. q. f. o. b. cars Seattle, duty paid, about \$10.75 per hundred. 38/40's about 25 cents per hundred less. My records on 38/40's is as follows: March 29, \$10.50 f. o. b. Coast, Apr. 1, \$10, Apr. 19, \$9.25. It was about \$9.50 June 1st.

The price in Chicago is usually the price on the Coast plus [52] all charges necessary to get the nuts to Chicago. We tried to sell the peanuts in controversy here, through our Chicago office, but were unsuccessful.

I would say \$9.75 per hundred in Chicago was a fair market price May 20, 1920, based on the f. o. b. Coast price of \$9.75 according to my records.

#### Cross-examination.

I know different sizes of peanuts are used for different purposes and in buying them a merchant may have a certain size in mind.

I do not know when the market decline began, the big slump came in April. There seemed to be a gradual decline from March on.

#### Deposition of L. W. Eilertsen, for Plaintiff.

L. W. EILERTSEN, a witness for plaintiff, being first duly sworn, deposed and said:

I am the treasurer of I. F. Laucks, who do general inspection and medical work. I was so employed in March, 1920. At that time we inspected 100 tons of Chinese peanuts for the National Importing & Trading Co. and issued Chamber of Commerce Certificate at the request of Mr. Olmstead



(Deposition of L. W. Eilertsen.)

of that company. Five hundred and sixty bags were marked three stars, 1600 bags marked ITC in a diamond. We delivered the Chamber of Commerce certificate to the National Importing & Trading Co. The copies of the certificates sent to them are the ones you previously introduced as Exhibits 13-A and 13-B and were retained in our files from the date of issuance. The copies were made at the same time as the originals. The information contained in the certificates is correct.

The following is a copy of the original card which shows the making of the inspection: [53]

“Commodity: 1600 bgs Peanuts—No. 10555.

Grade Chinese Shelled.”

“Less than —% Split, Spotted, Discolored and Foreign.

Count 36-38.

Mold No.—. Vermin No.—.

Worms —. Weavils —.

In Sound Merchantable condition—Yes.

Years—Crop 1919.

F. A. Q.—Yes.

Remarks: 100# Bgs.

I T C

#118

(Deposition of L. W. Eilertsen.)

(Reverse side of Card:)

| Wn.    |     | Sn. | T.  |
|--------|-----|-----|-----|
| 10 oz. |     |     |     |
| 111    | 373 | 6   | 379 |
| <hr/>  |     |     |     |
| 111    | 362 | 9   | 371 |
| <hr/>  |     |     |     |
| 111    | 367 | 10  | 377 |

$$\begin{array}{r} 3)1127 \\ \hline 37.6 \end{array}$$

| Wn.    |     | Sn. | T.  |
|--------|-----|-----|-----|
| 10 oz. | 363 | 12  | 375 |
| —      | 365 | 10  | 375 |
| —      | 368 | 8   | 376 |

$$3)1126( \quad 37.6''$$

The mark I T C in diamond with 118 below it identifies the lot. The number 10555 is the number of the inspection certificate issued.

The 37.6 indicates the number of nuts per ounce. It is larger than the 38/40's and usually brings a higher price. [54]

The Chamber of Commerce and Commercial Club have a committee of men pass upon the sample used by the inspector and check up his work and the certificates are signed by the directors of the Chamber of Commerce and Commercial Club.

(Deposition of L. W. Eilertsen.)

Cross-examination.

I did the grading on the 560 bag lot. Mr. Scott did that on the 1600 bag lot. The inspection was at the instance and request of the National Importing & Trading Co.

**Deposition of George A. Jensen, for Plaintiff.**

GEORGE A. JENSEN, a witness for plaintiff, being first duly sworn, deposed and said:

I am and was in March, April, May and June, 1920, connected with the Seattle office of W. R. Grace & Co., Importers and Exporters. They had a Chicago office in 1920.

As manager of the Merchandise Department I had charge of the selling of the 100 tons of peanuts in controversy for C. Itoh & Co. We were requested to sell them at the best price obtainable and they were sold through our Chicago office. The collection was made and \$15,183.38 turned over to C. Itoh & Co. for which we got receipt. The money was paid June 22, 1920. We sold 400 bags May 19; 1200 bags May 29; 399 bags May 29, 1920. All were sold at \$9.75 per hundred net, weights Chicago.

We deducted \$4,345.48 for freight charges, weighing, storage, sampling and commission. It is correct.

I was familiar with the peanut market at that period, having sold large quantities of peanuts during 1920. Between March 15 and May 29, 1920, the market was falling. The price obtained

(Deposition of G. A. Pande.)

for these peanuts was a fair price. We sold the peanuts at the best price we could get. [55]

**Deposition of G. A. Pande, for Plaintiff.**

G. A. PANDE, a witness for plaintiff, being first duly sworn, deposed and said:

I am now and was in March, April, May and June, 1920, Manager of the Northwest Trading Company, general importers and exporters.

I was familiar with the peanut market in 1920.

A 36/38 peanuts is larger than 38/40 and is slightly higher in price.

We got an offer from Hongkong April 3, 1920, of \$10.75 per hundred c. i. f. for 38/40 for a 100 ton lot. We received an offer on May 20 for 100 tons 38/40 peanuts of \$6.45 c. i. f. The market was declining between March 15 and June 1, 1920. I think \$9.75 received for those peanuts when sold in Chicago was the top price for that day.

**Cross-examination.**

36/38 is not as common a grade as 38/40 in Chinese yellow peanuts in this market. The greater amount of sales in this district are 38/40.

Peanuts are bought by the count according to the particular purpose for which intended. The market in March and April 1920 was about as good for 36/38's as 38/40's.

**Redirect Examination.**

The Northwest Trading Company had offices all over the United States and the Orient and was closely in touch with the market.

(Deposition of Arthur E. Campbell.)

A 37.6 peanut is so near a 38/40 that there is no material difference. A peanut averaging 38 count would be classed as a 38/40. [56]

**Deposition of Arthur E. Campbell, for Plaintiff.**

ARTHUR E. CAMPBELL, a witness for plaintiff, first duly sworn, deposed and said:

I am claim adjuster for the Hartford Accident & Indemnity Company. In the period from March to June, 1920, I was connected with A. U. Pinkham & Company, Importers and Exporters.

I was a salesman in the Seattle office and had charge of peanut sales.

On June 1st, 1920, I became the San Francisco Manager for the same firm. I was familiar with the peanut market during this period.

The 36/38 peanut was about 25 cents per hundred higher than 38/40's during this period.

I do not believe there is any difference in the utility in the trade between 36/38's and 38/40's. They can be put to practically the same uses.

The difference is between the large sizes 28/30's and 30/32's and the small 36/38's and 38/40's. A premium is paid for the larger nuts.

I kept track of the peanut market between March 15 and June 1, 1920, and tabulated them. There was a falling market. I prepared a chart twice a week, and left it in the San Francisco office. The market declined steadily from the latter part of January, 1920, to June, 1920, with a slight rise in February, 1920. It was a rapid de-



(Deposition of Arthur E. Campbell.)

cline. The peak of the prices in February 1920 was about  $12\frac{1}{2}$  cents per pound, duty paid, f. o. b. Pacific Coast. It declined steadily to about 8 cents June 1, 1920. The 30/32's were selling the latter part of January 1920 at  $13\frac{3}{4}$  to 14 cents per pound and declined steadily to June 1st, to  $9\frac{1}{2}$  cents, all prices duty paid f. o. b. cars Pacific Coast, net re-weights. In Chicago the price would be the same plus freight and handling charges. [57]

We tried to sell the peanuts in this case after Kockos Bros. refused them. We offered them to our Chicago office first at  $10\frac{1}{2}$  cents, duty paid, f. o. b. cars, Seattle about March 28th or 29th, 1920. They could not sell at that price so we offered them at 10 cents about April 1, 1920. Heavy arrivals from the Orient flooded the market. We made special efforts to dispose of these peanuts but were unable to do so. The price of \$9.75 per hundred obtained for these peanuts in Chicago was in my opinion a very very good price.

#### Cross-examination.

The differential of 25 cents between 36/38's and 38/40's is the price demanded by the owners of the peanuts.

I believe the apex of the market on 36/38's and 38/40's was January 13, 1920.

**Deposition of Adrian H. De Young, for Plaintiff.**

ADRIAN H. DE YOUNG, a witness on behalf of plaintiff, first duly sworn, testified by deposition as follows:

I am 30 years old; live in Chicago and am District Manager of De Young & Co. I am in the Oriental import and export business; have been engaged in the business for several years. I was in Seattle in charge of the Seattle office of the National Importing & Trading Company for two years. I remember a contract between the N. I. & T. Co. and Kockos Bros. for one hundred tons of peanuts. In March 1920, the Chicago office of the N. I. & T. Co. told us to inspect the shipment. Kockos Bros. notified us that Itoh & Co. would give us the inspection order. We turned the order over to the Chamber of Commerce who made the inspection. I remember there were two lots, the smaller lot counted 38/40, and the balance 36/38 to the ounce. The nuts were in good condition, free from foreign matter or bugs [58] of any kind, neither were they rancid nor did they carry an excessive amount of splits. I am familiar with the trade custom throughout the United States with regard to peanuts. When a contract calls for 40 count any peanut that is equal to 40 nuts per ounce or a larger sized peanut which would count less than 40 to the ounce would be a good delivery under such a contract according to trade custom.

(Deposition of Adrian H. De Young.)

I always keep myself familiar with the market conditions in the peanut business. I did all the buying and selling for the company while in charge of the Seattle office.

Between March 1st and June 1st, 1920, the peanut market was constantly falling. In March 1920 I do not think the price f. o. b. cars Seattle for 36/38 or 38/40 peanuts was over ten cents. A month or so earlier they had been as high as 12 cents. There was not over a quarter of a cent difference between 36/38 and 38/40 peanuts. The 36/38 being the higher. Between March and May 1920 I could say the price fell a cent and a half or maybe two cents per pound. In Chicago the price is higher than in Seattle due to the freight and possible fluctuations due to local conditions. The National Importing & Trading Company were taken over by a committee of creditors in May, 1920, and were adjudged bankrupt January 1921.

[59]

**Testimony of M. J. Collum, for Plaintiff.**

M. J. COLLUM, a witness sworn on behalf of plaintiff, testified as follows:

I am in the importing and exporting business in San Francisco. I have been in that business for eleven years. I am vice-president of the National Mercantile Company. I have been with that firm since November 1921. Prior to that I was second vice-president of the S. L. Jones & Co. in San Francisco. I have handled peanuts very extensively ever since I have been in the import busi-

(Testimony of M. J. Collum.)

ness. I have bought and sold Chinese shelled peanuts extensively in this and other markets. A 38-40 count means an average of 38 to 40 peanuts to the ounce. A 36-38 count means 36 to 38 peanuts to the ounce, etc. There is very little difference between 38-40 and 36-38, this can hardly be detected except by actually counting them. There is practically no perceptible difference to the eye between the two. The only way to determine the difference is by an actual count of the kernels.

Samples of 36/38 count, marked No. 1, and samples of 38/40 count, marked No. 2, were introduced by the plaintiff, samples of each count being in separate boxes, and both boxes were passed to the jury and examined by the jurors.

Mr. BROWNSTONE.—In the contract calling for a 40 count average, what would you consider, or what would be considered in the trade a good delivery under such a contract?

The WITNESS.—The peanuts must not exceed 40 peanuts to the ounce.

Mr. BROWNSTONE.—That is, would you say that it must be at least 40 to the ounce, or less?

Mr. PARTRIDGE.—I will object to that, if your Honor please, on the ground that it is—

Mr. BROWNSTONE.—I will withdraw the question.

Mr. BROWNSTONE.—Would you say a 36/38—

The COURT.—Just let him explain that count.

Mr. BROWNSTONE.—All right.



(Testimony of M. J. Collum.)

The COURT.—Q. In a contract calling for a 40 count, [60] what would be recognized as a delivery in the trade?

The WITNESS.—They must not exceed 40 to the count.

The COURT.—Q. You mean by that that there might be 36?

The WITNESS.—Yes. You see the idea, your Honor, is to do away with the possibilities of rejection of a large sized count. In other words, if the peanuts run over 40 they have a cause for rejection.

Mr. PARTRIDGE.—I move to strike out all that evidence upon the ground it isn't admissible to show or explain the terms of a written contract.

The COURT.—Overruled.

Mr. PARTRIDGE.—May we have an exception?

The COURT.—An exception, yes.

EXCEPTION No. 1.

The WITNESS.—(Continuing.) I would say a 38-40 or a 36-38 count would be a good delivery under a contract calling for a 40 count average. Such is the general understanding of the trade. We prefer the 36/38 because it is a better peanut.

Mr. BROWNSTONE.—Q. Well then it is generally understood in the trade that a delivery under a contract such as this, of a 36-38, is a delivery under the contract?

The WITNESS.—What is the question, again?

(Question repeated by reporter.)

Mr. PARTRIDGE.—I will object to that upon



(Testimony of M. J. Collum.)

the ground that evidence of custom is not admissible to show or to vary the terms of a written contract.

The COURT.—Overruled.

Mr. PARTRIDGE.—May we have an exception?

The COURT.—An exception, yes.

EXCEPTION No. 2.

The WITNESS.—Yes, it is. [61]

The WITNESS.—(Continuing.) The market for Chinese shelled peanuts was declining in February and March into April and I think then remained stationary during April and May. I think a fair market price for Chinese shelled peanuts on 1600 bags of 36/38's and 400 bags of 38-40's, being 100 tons, on May 20 in Chicago would be about \$9.75 or \$10.00 per hundred.

Cross-examination.

In my opinion the market price on the Pacific Coast in May was about  $8\frac{1}{2}$  to  $8\frac{3}{4}$  cents. The freight rate to Chicago was about \$1.25 per hundred. I do not know what the market price was in February, 1920, nor in Seattle, March 2, 1920, nor March 13 or 15, 1920, nor March 30, 1920, nor in Chicago April 22, 1920. They were worth more on March 2 and March 15, 1920, than on May 22, but I do not know how much more. I know that certain sized peanuts are used for some purposes and another size for other purposes.

Redirect Examination.

Generally speaking, a 36-38 peanut can be used for any purpose a 38-40 peanut can be used for.

**Testimony of H. W. Seaman, for Plaintiff.**

H. W. SEAMAN, witness sworn on behalf of plaintiff, testified as follows:

I have been in the importing business for four years in the Oriental import department of W. R. Grace & Co. I handle many thousand of tons of peanuts and am familiar generally with the prices of Chinese shelled peanuts during the year 1920 on the Pacific Coast. The market price began to decline, I think, in February, 1920, and kept declining until May. I can't tell accurately, but I think during the latter part of May, 1920, the price on the Pacific Coast was between 7 and 8 cents. The Chicago market is relative to the coast market, the difference being that the Chicago market is higher by the differential in freight from here to Chicago. If the market were six cents in California, for example, in Chicago it would be six cents plus the cost of hauling the goods to Chicago. I am familiar with the various counts of peanuts. It is generally accepted and understood [62] in the trade that a delivery of a lesser count is good under a contract calling for a 40 count.

**Cross-examination.**

I know there are uses for smaller sized peanuts which larger ones will not fill but a 36-38 count can be used for any purpose a 38-40 can be used for, because it is such a close size to it. A 37-count delivery is good under a 40-count contract. I do not know accurately the market price in March, 1920; it was about  $8\frac{1}{4}$  to 9 cents March 2d. The market was gradually declining.

**Testimony of Arthur Rude, for Plaintiff.**

ARTHUR RUDE, a witness sworn on behalf of plaintiff, testified as follows:

I have been in the importing and exporting business for six years, formerly as vice-president and manager of Nuzaki Bros., Incorporated, now for myself. I am familiar with the prices of Chinese peanuts in 1920, having handled roughly over 100,000 bags. The market was declining rapidly from about the 10th of February to about May 1st. In May, 1920, I would say roughly the price on 100 tons of 36-38 or 38-40 count peanuts on the Pacific Coast was about  $7\frac{1}{2}$  or  $7\frac{3}{4}$  cents. In Chicago it would be about \$1.75 per hundred pounds more due to freight. It is generally understood in the trade that a delivery of 36 to 40 would be a good delivery under a contract calling for 40-count average.

**Cross-examination.**

The market price for such peanuts on the Pacific Coast March 2, 1920, was approximately 10 cents. March 15, 1920, about 9.5 or 9.75, March 30, 1920, about stationary; about April 22, 1920, almost a cent lower. Between April 22 and May 22, 1920, about another one cent drop.

Plaintiff rests. [63]

Mr. PARTRIDGE.—Q. Do you know, Mr. Rude, what the market for peanuts was in Pacific Coast ports on the 2d of March? A. What count?

Q. Either 38-40 or 36-38?

A. Either 38-40 or 36-38 on the 2d of March?

(Testimony of Arthur Rude.)

Q. Yes.

Mr. BROWNSTONE.—Q. You mean 1920, do you?

Mr. PARTRIDGE.—Yes.

A. I would say approximately 10 cents.

Q. What was it about the 15th of March?

A. About 9.75 or 9.50.

Q. And the 30th of March?

A. Probably stationary.

Q. About the same? A. About the same.

Q. And how was it about the 22d of April?

A. About the 22d of April, almost a cent lower.

Q. And then was there another fall of a cent between the 22d of April and the 22d of May?

A. Yes, sir. There was almost a cent. On some sizes there was a cent and a half decline, until about the first week in May it was stationary for a while, and then they took another drop.

Mr. PARTRIDGE.—That is all.

Mr. BROWNSTONE.—That is all. That is our case.

Mr. PARTRIDGE.—Now, if your Honor please, we will move for a nonsuit as to the whole case upon the ground that it appears from the evidence that the plaintiff did not comply with the contract, in that the goods tendered were goods of a different count, peanuts of a different count, from those which the contract called for. And upon the second ground that the representations that were made by the plaintiff to the defendant at all times, even after they had received the Chamber of



Commerce certificates, were to the effect that these peanuts were 40 count, and they were not a 40 count. [64] And upon the third ground that the parties contracted in explicit terms that the Chamber of Commerce certificates should be conclusive and binding upon the parties as to the count, and the Chamber of Commerce certificates showed that the peanuts were not a 40 count, but a 36-38 count. I want to call your Honor's attention to the fact that, so far as the courts of California are concerned, the Supreme Court and the Court of Appeals of this state have universally held that there were specific terms in a contract, limiting and defining the quality of the goods which are the subject of the contract, any custom inconsistent with the terms of that contract is not a proper subject matter of investigation, nor will it support an action based upon that contract. And I cite your Honor the case of Lenhardt against the California Wine Association, 5 Cal. App. 19. Secondly, the Supreme Court of this State, following the case of the Standard Oil Company against Van Eppen in the Supreme Court of the United States, in the case of the California Sugar Company against Pennoyer, 167 Cal. 274, laid down in the rule that nothing is better settled than the rule that where the parties agree that the performance or the nonperformance of the terms of a contract, or the quality, price, or quantity of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding in the absence of fraud or mistake, and a



mistake which will justify an impeachment of the arbitrator's decision is not mere error of judgment but is the kind of mistake which in effect would amount to fraud. The testimony of the plaintiff itself, if your Honor please, shows that on February 19th, when they received advices from Kobe that these 80 tons, which make up the 1,600 bags, which were not according to count, had been shipped, they notified Kockos Brothers that the goods as shipped were 40 count, to apply [65] on the contract. Then upon their arrival, again they notified them that 100 tons of peanuts to cover that contract had arrived. On the 15th of March, when they had, according to the evidence, the Chamber of Commerce certificates in their hands, they again referred to their wire of March 2d, and informed Kockos Brothers that the goods were there, and that they were awaiting shipping instructions. Then even again, on March 27th, when the goods were on their way to Chicago, they write another letter, which is Exhibit "18," and they state there: "Referring to your purchase of 100 tons 40 count Chinese shelled peanuts, and the instructions to ship them to the National Importing and Trading Company." They again state that they have shipped those particular goods, and they accompany that by an invoice which states that the 1,600 bags and the 400 bags are 38-40 count; and it was then, upon the arrival of the documents, including the Chamber of Commerce certificates, that for the first time Kockos Brothers knew the peanuts did not

comply with the contract. We therefore submit we are entitled to a nonsuit upon the grounds that the goods tendered did not comply with the contract.

The COURT.—I think the matter is a question for the jury, gentlemen. The motion will be overruled.

Mr. PARTRIDGE.—If your Honor please, we now move for a nonsuit as to the 400 bags of peanuts which did comply with the contract, upon the ground that Kockos Brothers offered to accept those 400 bags, and the plaintiff refused to deliver them.

The COURT.—What have you to say to that, Mr. Brownstone?

Mr. BROWNSTONE.—Simply this, if your Honor please, that the contract is not a severable contract; that we are entitled to performance in its entirety, or not at all; that is, if, for instance, we purchased 100 tons of peanuts, we are not at liberty to say we will [66] take 20 tons or 30 tons or 40 tons, but we are required to take it all, or none. On the other hand, it is just the same so far as the purchaser is concerned: If you make a contract to purchase, for instance, 100 tons of peanuts, you are not justified in saying "I will deliver 20 tons," or "I will deliver 30 tons." You have got to deliver the whole amount. In other words, it is not a severable or separate contract as that is generally understood. A separate contract may be one, for instance, where there are a number of different commodities. They might

be peanuts; they might be beans; they might be potatoes. And where you agree to buy, for instance, in one contract a number of different items, then the contract may be considered to be separable as to those particular items but where a contract is specific as to a certain amount, and as to a certain price, that is the entire contract, and must be so held. I have presented to your Honor some instructions along these lines, with authorities from California which I have looked up, also from the Corpus Juris, showing that a contract such as this is not a separable contract, but is an entire contract.

Mr. PARTRIDGE.—It appears from the evidence, if your Honor please, that there were two shipments of these peanuts, that is to say, the 80 tons arrived on a different vessel from the other 20 tons; so that there were two clear and distinct lots. It appears from the evidence that the 20 tons, that is, the 400 bags, were part of a lot of 560 bags that were consigned in Seattle to somebody else; so that there is a clear line of demarcation as between these 400 bags which were tendered, which did comply with the contract, that is, that were 40-count peanuts, and the 1,600 bags which arrived on a different ship, and which did not comply with the contract. And it would seem to me that where there is a definite contract for a definite quality of goods, and where they arrive in port in two lots, and one of those lots does comply with [67] the terms of the contract, and one of them admittedly does not comply with

the terms of the contract, that the contract is severable to the extent that the vendee offering to take those goods which did comply with the contract, and rejecting the others, certainly could not be held to damages because the vendor, forsooth, chose to take the whole shipment and send them on to Chicago and hold them there. It seems to me that that, along the lines of all reason, would seem to excuse the vendee in any event from any damages arising from the decline in the market in those goods which he agreed to take, and there could be no injustice in that. The fact that the vendor might have delivered to us 20 tons, or one-fifth of the entire shipment, certainly couldn't in any way lower or depreciate his rights as to the other 80 tons. It would seem like it would be an injustice from any possible view of the case to say that Kockos Brothers, while they were perfectly willing to take these goods which admittedly complied with their contract,—to say that the vendor could hold those and wait until the market had broken, and then sell the whole lot, although Kockos Brothers were ready to take those goods which complied with the contract.

Mr. BROWNSTONE.—Would your Honor permit me just a word in reply? And it seems to me this is a complete answer to counsel's entire contention in this case, and that his contention shows that, as a matter of law, there had been a breach of the contract. That is this: Your Honor will recall that on March 10th, and that was before any shipping instructions were given,



Kockos Brothers employed Graham, from Seattle, to make an examination of these peanuts; that Graham reported to them the examination of these peanuts on March 12th, which was two days later, and five days prior to the time that Kockos Brothers gave instructions to ship. That telegram of Graham's of March 12th reported to Kockos Brothers [68] that 1,600 bags were 37 count, and, in the parlance of the trade, that would be 36-38; and that 560 bags, of which he was to get 400, were 38-40 count. With full knowledge of the condition of those peanuts knowing that the 1,600 bags were 37 count, and that 400 bags were 38-40 count, he accepted delivery of them by notifying Kockos Brothers, and they notified him to ship them on to Chicago. As a matter of law, and your Honor knows it is a principle that is thoroughly well established, where a man accepts personal property which he may claim doesn't come up to the standard, where a defect which he claims exists in the merchandise is patent, which he himself can see, when he takes that merchandise without making any objection of any kind, and the testimony shows that no objection of any kind was made, he is forever estopped and precluded from ever making any claim that the merchandise was not what he contracted for. Leaving out of consideration, if your Honor please, the other points which were made, and also the testimony that a contract for an average of 40 count is satisfied by a delivery of peanuts which average 36-38 count, as a matter of law in



this case there has been a breach of contract, because, by the acceptance of those peanuts, with full knowledge of their condition, Kockos Brothers are estopped and they have waived any claim they might have against the plaintiff in this case for any alleged difference in the quality.

The COURT.—This consideration would seem to be entirely aside from the point involved in the present motion, however. Assuming that there was a breach of contract as to the 1,600 bags, the question is whether or not the plaintiff can now claim damages on account of the 400 bags which the defendant offered to receive. I don't believe that that is a matter for a motion for nonsuit, gentlemen. I shall deny the motion; however, without prejudice to a reconsideration of the question when it comes to submitting the [69] case to the jury. I will say to you, Mr. Brownstone, my impression is rather against you on that, but I will hear you a little further. I have difficulty in seeing why you should be unwilling to deliver the 400 bags if the offer to take them was unconditional. Of course, if it was conditional upon a settlement of the entire transaction, then there would be no tender of acceptance at all; but I won't entertain further discussion at the present time. The motion will be denied, but as I say, without prejudice to a reconsideration of the question when it comes to instructing the jury what the measure of damages will be.

Mr. PARTRIDGE.—Will your Honor permit us an exception to both rulings?

The COURT.—Yes.

EXCEPTION No. 3.

**Testimony of J. S. Courreges, for Defendants.**

J. S. COURREGES, a witness sworn on behalf of defendants, testified as follows:

I live in San Francisco and have been in the exporting and importing business for twenty-two years. I have been connected with The Hale Company for the past eight years. I have handled large quantities of Chinese shelled peanuts for 15 or 16 years. I am familiar with the fact that they are dealt with by count. According to the general custom of the trade a delivery of 36-38 count peanuts would not be a good delivery under a contract calling for a 40-count average but a delivery of 38-40 count would be a good delivery.

**Cross-examination.**

I do not recall that there was a sharp break in the peanut market in the early part of 1920. A 36-38 peanut is as good as a 38-40 peanut and can in many respects be used for the same purposes. I believe I have sometimes received 36-38 count on a 38-40 count contract and have, I believe, sometimes delivered 36-38 count on a [70] 38-40 contract. I didn't consider I was complying with the contract when I delivered the 36-38's, but as long as the market was favorable to the buyer he did not object. They generally object on a falling market but there are other objections

(Testimony of J. S. Courreges.)

also. When a market is favorable to the buyer, nobody makes any objection. In the general run of peanut business, they never raise any objection to a peanut that is 36/38, where the contract calls for 38/40, and then only when the market is falling. We never have any rejections for that reason on a rising market.

**Testimony of A. Schuman, for Defendants.**

A. SCHUMAN, a witness sworn on behalf of defendants, testified as follows:

I live in San Francisco; I am an importer and have been for thirteen years. I am familiar with Chinese shelled peanuts and the price of them in March, April and May, 1920. The price of Chinese shelled peanuts, duty paid on the Pacific Coast March 1st, 1920, was  $11\frac{1}{2}$  cents for 38's, March 12th it was \$11, and March 26th \$10.85. April 8th it was  $10\frac{1}{4}$ ; all prices duty paid. From April 22d to April 28th \$9.00 duty paid. During May the price remained stationary. According to the general custom of the trade a delivery of peanuts of 37.6 count would not be a good delivery under a contract calling for a 40 count.

**Cross-examination.**

The price of \$11.50 in March would not be for a less quantity than a carload because we never handled any less quantities, we sell wholesale. The price in Chicago would be the same, plus the freight and probably a little more. There was a falling market because there were a lot of pea-

(Testimony of A. Schuman.)

nuts afloat. We handled 8,000 tons of peanuts that season and I do not think I would have had any difficulty in selling 100 tons in April at very close to the price I quoted. There might have been sales at 81½ cents, but I do not know of any.

In order to be a good delivery under a 40-count contract the peanuts would have to average 38-40. A 36-38 peanut is as good as [71] a 38-40, but I do not know whether it can be used for the same purposes or not. I do not recall ever having accepted or delivered 36-38 peanuts on a 38-40 contract. I do not recall of any instance of anybody objecting to a delivery of 36-38 peanuts on a 38-40 contract, except the market was falling. There is no visible difference in the size of the peanut. I might be able to distinguish between a 36/38 and 38/40 if I had them side by side. I could see that the 36/38 was perhaps a little larger. (The witness was then shown by Mr. Brownstone the two boxes of peanuts heretofore offered in evidence, the 36/38 count being marked No. 1, and the 38/40 count being marked No. 2, and was asked to examine the two samples, and then to tell which box was 36/38 count and which was 38/40.)

Mr. BROWNSTONE.—Q. Supposing you look at these two boxes of peanuts and tell us whether you can tell one is 38/40 and the other is 36/38, or are they the same? What would be your judgment on it?



(Testimony of A. Schuman.)

A. Offhand I would say that these here (indicating 36/38 box) were the 38/40.

Mr. BROWNSTONE.—Well, your guess was wrong. I just want to call the jury's attention to the fact that this is the 36/38.

Peanuts have regular grades according to the custom of the trade. A delivery of 40-42 count would not be a good delivery under a contract calling for 40 count average because of the trade custom. "Chinese peanuts 40 count average" does not mean either 40 or less, nor 40 or more.

#### Redirect Examination.

It does not mean 40 or less because that would permit of any size under 40 and there are particular sliding scales of sizes and a man buys a particular size for his own purposes and when he contracts for 40 count that is what he wants.

#### Recross-examination.

I don't recall stating that I never heard of a man rejecting a lot of peanuts where he contracted for a 38-40 and was delivered 36-38, except on a falling market. A 40 count means 38-40 and a delivery of 30-32 or 28-30 would not be a good delivery. The trade have exact counts of 30-32, 32-34, 34-36, 36-37 on up to 38-40 and each grade will give that average in between say 38-40 or 30-32. Under trade custom a delivery of peanuts that counted 38 would be good under a contract calling for 40-count average.



**Testimony of Andrew Kockos, for Defendants.**

ANDREW KOCKOS, a witness called on behalf of defendants, testified as follows:

I live in San Francisco. I am one of the defendants in this case, my brother Harry is the other. I am in the wholesale [72] groceries business in San Francisco and have been for 15 years. We had made a contract of sale for the peanuts purchased under this contract from Itoh & Company, to a National Importing & Trading Company. Here counsel argued as to the admissibility of the contract between defendants and the National Importing and Trading Company. Counsel for plaintiff conceded that there was such a contract.

Mr. PARTRIDGE.—If your Honor please, are we not entitled to that testimony and the testimony following it, in regard to rejection upon this ground: An attempt has been made here to show that a delivery of 36–38's is a good delivery under a contract calling for 40's. Are we not entitled, in answer to that, to show that, as a matter of fact, the very person to whom we agreed to deliver these peanuts did not treat it as a good delivery and rejected on us?

The COURT.—No, not for that purpose. For that purpose the offer will be rejected, and you may have your exception.

Mr. PARTRIDGE.—May we have an exception to that?

The COURT.—Yes.

EXCEPTION No. 4.

Mr. PARTRIDGE.—Now, on the other point, I am not sure whether Mr. Brownstone admits that this Company was not the agent of Kockos Brothers or not.

Mr. BROWNSTONE.—I don't think it is necessary for me to make an admission of law. I am making an admission of fact, that there was a contract for the sale of this 100 tons of peanuts made by Kockos Brothers with the National Importing & Trading Company. Those are the facts before the Court, and the question of agency is one for the Court to determine.

The COURT.—And that telegram upon which you rely was [73] sent to it as such purchaser?

Mr. BROWNSTONE.—There wasn't any telegram sent to it, may it please the Court. The telegram was sent to my clients, telling them that they should deliver to the order of the National Importing & Trading Company. That is all we are claiming.

The COURT.—Counsel has admitted, any way, that a contract existed, and that is all that you can prove by this instrument, that a contract existed between the defendant here and the National Importing & Trading Company, by which the latter was to take over these peanuts, in other words, a contract of sale for these peanuts. If you wish to explain that telegram in any other way, of course you may make your offer.

Mr. PARTRIDGE.—I will offer in evidence this contract between Kockos Brothers and the National Importing & Trading Company, and will call your Honor's attention to the fact that it provides that it is the National Importing & Trading Company of—

Mr. BROWNSTONE.—I suggest it isn't necessary for counsel to read that contract.

Mr. PARTRIDGE.—I am not going to read it. I call your Honor's attention to the fact that the National Importing & Trading Company is here designated as being of Chicago, and not of Seattle. Now, it is very likely that they knew nothing about this matter until the documents came, the same as we didn't.

The COURT.—This instrument wouldn't be proof of that fact, anyway. In view of the admission of counsel for the plaintiff, the offer will be rejected, and you have your exception.

Mr. PARTRIDGE.—And your Honor will let us have an exception?

The COURT.—An exception, yes. We will take a recess until 2 o'clock.

EXCEPTION No. 5. [74]

The following contract offered by defendants and rejected is as follows:

MERCHANDISE CONTRACT.

KOCKOS BROS.

Importers, Exporters and Wholesale Grocers.

Cigars and Tobaccos.

46-56 California Street.

No. 169.

San Francisco, Cal., November 10th, 1919.

KOCKOS BROS., San Francisco, California, hereby agrees to sell and NATIONAL IMPORTING & TRADING CO., Inc., Chicago, Ill. hereby agrees to buy

Article: CHINESE SHELLLED PEANUTS 38/40s,

F. A. Q. of the Season, 1919 crop.

Quantity (About): 100 TONS, (2,000# each).

Shipment: December/January from the Orient.

By Steamer or Steamers, Direct or indirect to:

Price: \$12.00 per 100#, duty paid, F. O. B. Pacific Coast, gross for net weights, landed re-weights.

Payment: Sight draft against railroad bills of lading, payable on presentation.

Remarks: Goods to be in good merchantable condition on arrival at Pacific Coast.

KOCKOS BROS.

ANDREW KOCKOS,

Sellers.

Accepted:

NATIONAL IMPORTING & TRADING  
CO., INC.

R. FIRMAN,

Buyers:

J. A. WICKMAN & CO.,

By ARTHUR BETTS,

Broker. [75]

Here a recess was taken to 2 o'clock P. M., June 7th, 1922, and Andrew Kockos testified further as follows:

Mr. PARTRIDGE.—If your Honor please, I am going to hand to the witness a telegram and letter, somewhat along the lines I suggested this morning, and after I have shown it to counsel, I will state the theory that I have in mind. If your Honor please, my idea in offering them is this—

The COURT.—Perhaps there is no objection. Do you offer this telegram?

Mr. PARTRIDGE.—Yes, the telegram and the letter.

Mr. BROWNSTONE.—We object to both of them, your Honor, on the ground they are entirely incompetent, irrelevant and immaterial. They are in the nature of hearsay statements, and statements made by the National Importing & Trading Company, not under oath, to persons other than the plaintiff in this case, in a transaction with which the plaintiff was not in any way connected. It is purely a hearsay statement.



Mr. PARTRIDGE.—My idea in regard to that, if your Honor please, is this: Evidence has been presented by the plaintiff which they claim shows that, under the custom of the trade, where a contract calls for peanuts of a certain size larger peanuts will be accepted. I submit it is competent for us to show as to these very peanuts that they were not accepted by our purchaser, and the reasons why the purchaser would not accept them. I suppose that that general custom can be shown as well by specific instances as it can by anybody's opinion, and I think for that reason those communications are competent.

The COURT.—Assuming it could be shown by specific instances, you would have to produce the witnesses so that they would be subject to cross-examination. This would be merely hearsay.  
[76]

Mr. PARTRIDGE.—Well, is it hearsay, if your Honor please, when the document itself constitutes the act? That is to say, those papers are the rejection of the goods. They constitute the act by which that specific purchaser refused to accept the goods, for the reason given. I submit to your Honor isn't that an act in itself, rather than a mere statement?

The COURT.—The objection will be sustained.

Mr. PARTRIDGE.—Will your Honor permit us an exception?

The COURT.—Yes, you may have an exception to each.

EXCEPTION No. 6.

The telegram and letter offered by defendants and rejected are as follows:

“1920, Apr 7 AM 11 55

B155CH 44 Blue

D Chicago, Ills. 11 A 7

Kockos Bros.

San Francisco, Calif.

We have just received Chamber Commerce report on your shipment of peanuts. They do not correspond with the contract either in count or date of shipment We cannot use and absolutely refuse to accept same as filling our contract one six nine Notify your shipper.

NATIONAL IMPORTING AND TRADING CO.”

“Apr. 7, 1920.

Kockos Bros.,

San Francisco, Cal.

Gentlemen:

We wired you today as follows:

“We have just received Chamber of Commerce report on your shipment of peanuts. They do not correspond with contract either in count or date of shipment We cannot use and absolutely refuse to accept as filling our contract one six nine Notify your shipper.

[77]

Our Seattle office could not give you instructions to ship peanuts that were not according to count regardless of whether they were larger or smaller. As a matter of fact the smaller count

100 *Harry Kockos and Andrew Kockos et al.*

(Testimony of Andrew Kockos.)

has a more ready sale in this market than the larger one, and while you may have tho't you were doing us a favor to ship 1600 bags of Peanuts that were larger than your contract called for, the facts are that these peanuts are not so valuable as the smaller count. If we had known what you were shipping us we would have wired you long before, as we cannot fill our contracts with this shipment.

Also these Peanuts were not shipped within the time limit of our contract, and for these various reasons we absolutely refuse to accept delivery of same on our contract with you.

Awaiting your further favors, we are

Very truly yours,

NATIONAL IMPORTING & TRADING  
CO., INC.

J. M. HOLFERTY,

JMH:AO.

Manager."

(The witness continued as follows:) I have bought and sold several thousand bags of peanuts during the year 1920 and am familiar with the price of shelled peanuts in March, April and May, 1920. On March the 1st the price was \$11.50 to \$11.75 on 38-40 count peanuts f. o. b. Pacific Coast. We made sales at 11.50. I do not know the price of the 36-38 count peanuts at that date. From March 10th to 30th the price on 38-40's was 11 cents per pound to 11¼. We made sales at \$11.00 per hundred f. o. b. Pacific Coast. During April, from 1st to 22d we made sales for

(Testimony of Andrew Kockos.)

\$10.45 per hundred pounds. On April 22d we made a sale at \$9.50 and on May 20th one for \$9.50 f. o. b. the Coast. I did not reject the peanuts immediately on receipt of telegram from Callaghan, Graham & Company of Seattle on March 11th because I did not consider the information binding under the contract. I did not know anything about what the Chamber of Commerce certificates showed as to count until I received the documents on March 29th or 30th.

Mr. PARTRIDGE.—When you sent the plaintiff, Itoh & Company, instructions to ship these peanuts to the National Importing & Trading Company, upon what were you relying?

Mr. BROWNSTONE.—That is objected to, if your Honor please, [78] as calling for his opinion and conclusion, and as incompetent, irrelevant and immaterial. It can't make any difference upon what he was relying. The only thing we can be governed by is the facts as they existed, and what he thought or felt in connection with this matter can't control the legal rights of the parties.

The COURT.—Objection sustained.

Mr. PARTRIDGE.—Will your Honor permit me an exception?

The COURT.—Yes.

#### EXCEPTION No. 7.

(The witness continued as follows:) In the peanut trade peanuts are graded by size from 20-30 up to 38-40's and for candy manufacture

(Testimony of M. J. Collum.)

a buyer must get the size specified for his particular use because he has screens through which the larger peanuts will not pass. For peanut butter the 36-38's will do just as well.

When you are not in actual possession of the goods on selling imported merchandise you must deliver the bill of lading and other documents to the buyer. When I received the invoice of March 17th from Itoh & Company which stated that there were 1600 bags 38/40 count and 400 bags 38/40 count I did not know anything about the size of the nuts or that 1600 bags were 37 count. In a contract such as this calling for 40 count average the general custom of the trade is to deliver peanuts coming very close to that count, say 39.7.

Here Mr. Kockos stepped down for a moment and M. J. COLLUM, witness for plaintiff previously summoned, was recalled and testified as follows:

**Testimony of M. J. Collum, for Defendant (Recalled  
—Cross-examination).**

**Cross-examination.**

I testified in the case of Christou vs. Bashaw as to the price of peanuts in the Spring of 1920. I was referring to a [79] specific size 32/34 count and they are an odd size. Not many of that size come into the market. They are used for blanching and bring a higher price than 36/38's and 38/40's which are used for confections. There may be two cents difference in the price.



**Testimony of Andrew Kockos, for Defendants  
(Resumed.)**

ANDREW KOCKOS, a witness for plaintiff, previously sworn, continued as follows:

There is never more than 50 cents difference in the price of 32/34's and 36/38's per hundred pounds. There are as many 32/34's as there are other sizes.

**Cross-examination.**

I sent a telegram, March 10, 1920, to Callaghan, Graham & Company, Seattle, Wash., to inspect 100 tons of peanuts 38/40 count for us because I had received an unsatisfactory report. I mean I had heard they were moldy. I don't remember whether the other report was written or not, I do not have it now. I received the following telegram from Callaghan, Graham & Company March 10, 1920.

"Examined today two lots China shelled peanuts totalling hundred eight tons per your wire fifth Itoh shipping 1600 bags ex Eastern Victor marked Diamond I. T. C. actual count 37, sound, clean, evenly graded, free from mould, dirt or worms, excellent condition, exceptionally good delivery on 40 count contract. Lot 560 sacks ex Eastern Ocean marked three stars, actual count 39, clean, free from worms, webs or dirt, average two nuts slightly mouldy out of 625. May not increase but don't like even slight trace. Advise if want samples. Callaghan, Graham & Company." [80]

(Testimony of Andrew Kockos.)

Q. You read that when you received it, did you not?

A. I read the wire in some respects, yes.

Q. Well, didn't you read the wire?

A. Yes.

Q. What do you mean by saying you read it in some respects?

A. In segregating and resting my mind as to the mould which I previously received the answer about, that several shipments in Seattle arrived in bad condition.

Q. Then you knew when you received this telegram that 1,600 bags of that shipment were 37 count, did you not?

A. I didn't pay any attention to the count because our correspondence was for 40, and not assuming in that respect that I would get what I did I paid no attention to the count at all.

Q. Will you look at this telegram again and tell us when you read it what you read? What did you see in this telegram if you didn't see that it said 37 count, 1,600 bags?

A. Well, this wire here represents 108 tons, for instance. Now 108 tons were more than our contract, and it was not separated to me clearly as to the particular count, and I don't know whether this man here had given me the right count. He wasn't a Chamber of Commerce man, but was an ordinary man to look at the shipment, so, therefore, I based my statement on the quality and not on the count of this particular wire.

(Testimony of Andrew Kockos.)

Q. You knew a peanut when it was packed was 100 pounds to the bag, didn't you?

A. Sometimes they come 140 pounds, and 130 and 200 pounds.

Q. You could tell from that telegram, couldn't you, that those peanuts were packed 160 to the bag?

A. It isn't quite clear, in my opinion, here, and, as I say to you, I didn't pay any attention to the count of these peanuts, and he was not the man that I got to count these peanuts, because to count the peanuts is a very delicate thing, a very delicate thing to take a certain number of [81] samples and weigh them, and such things as that, such as the Chamber of Commerce issues certificates on.

Q. Look at that telegram and tell me if it doesn't say 1,600 bags and 540 bags, totalling 108 tons? Isn't that what it says?

A. According to the wire here that is what it says.

Q. Now, it doesn't show 100 pounds to the bag?

A. Well, if you stop to figure it, it does, according to that.

Q. And you were buying 100 tons, were you not?

A. Yes.

Q. And you knew then that you had to take part of that 1,600 sacks in order to make up your hundred tons, didn't you?

A. As I say to you—

Q. Answer me. Didn't you?

(Testimony of Andrew Kockos.)

A. I did, with conditions, that I did not pay any attention whatsoever to the count, for this reason, that the contract which I had with Itoh & Company specified strictly 40's average count, with Chamber of Commerce certificates, and before I paid any attention as to particular count I had to have the certificate to represent and see that it was correct, because the Chamber of Commerce goes to work and opens 10% of the lot, which makes about 200 bags, and takes samples from various bags; and this man here did not open any of the bags. He just went down there and probably opened a bag or two and took just a few samples. And furthermore—

Mr. BROWNSTONE.—Well, I rather think the witness has answered the question.

Mr. PARTRIDGE.—I think he is entitled to a full explanation, if your Honor please.

The COURT.—Proceed.

A. And, furthermore, this particular wire was not quite straight for any man to go ahead and inspect 108 tons of peanuts with the same marks, and I didn't know what bags he opened particularly to [82] draw samples out to present me a 37 count. I wasn't sure that was a fact and I paid no attention to it, assuming that our contracts and the correspondence from Itoh & Company were in order, and I took it for granted I didn't have to go to the trouble or extra expense to have my man go to the Chamber of Commerce and issue another new certificate as long as I would get a certificate from Itoh & Company.



(Testimony of Andrew Kockos.)

Mr. BROWNSTONE.—Q. Mr. Kockos, you have testified, haven't you, that you had a contract that was 40 count average? Didn't you? A. Yes.

Q. And you claim, as I understand you, that, in order to comply with the terms of that contract, you had to get a peanut that would average about 39.6 to the ounce, didn't you?

A. Well, it would come around to that variation, yes.

Q. And you knew that at the time you received that telegram, didn't you?

A. I did not pay any attention to—

Q. I didn't ask you that. Didn't you know you had a contract with Itoh & Company at the time you received that telegram, which specified an average of 40 count? You can answer that yes or no, and make any explanation you want.

A. I said to you that I received this wire, and in reading the wire—I say yes, with the explanation as I previously explained.

Q. Your answer is that you did know at the time you received that telegram that you had a contract with Itoh & Company which provided for a delivery of an average 40 count peanut, didn't you?

A. Yes, I presume at the time I knew about it. Of course, we received, twenty, thirty or forty wires, and I couldn't have my mind on what occurred several months ago. And I presumed he wouldn't tell me anything else, and I acted in good



(Testimony of Andrew Kockos.)

faith according to the [83] instructions I received from Itoh & Company.

Q. Now, Mr. Kockos, knowing at the time you received that telegram that you had a contract with Itoh & Company which provided for a delivery of a 40 count average peanut, do you want to tell the Court and jury now that when you read that telegram you didn't see that 1,600 bags of peanuts described in that telegram as 37 count? Is that what you want to say?

Mr. PARTRIDGE.—If your Honor please, I will object to the form of that question as manifestly improper, as to what he wants to tell the Court and jury and the form of the question, I submit, is objectionable.

The COURT.—I think perhaps you have pursued the cross-examination on that far enough so as to enable you to argue the matter to the jury.

I read the telegram, but since I was only concerned with mould I did not pay any attention to the count because our contract called for count to be made by the Chamber of Commerce and this firm was not working for the Chamber of Commerce. I knew at the time I received this telegram that we had a contract with Itoh & Company calling for 100 tons peanuts 40 count average, but I did not pay [84] any attention to the count.

I wrote the following letter to Callaghan and Graham March 12, 1920, after receiving their telegram:

“We have received your wire of March 10th, giving us full information in regard to inspection of 100 tons peanuts to Itoh & Company, which information was very clear to us, and we thank you for your prompt inspection and answer. We will communicate with you from time to time to give you some of this business, and in the meantime if you are interested in buying anything kindly let us hear from you.

We remain yours very truly,

KOCKOS BROTHERS,

By ANDREW KOCKOS.”

After receiving the wire of March 10th from Callaghan, Graham & Company, I sent the following telegram to Itoh & Co. March 17th.

“San Francisco, March 17, 1920.

“Itoh & Company,

Central Building, Seattle.

Ship hundred tons peanuts Kockos Bros. Chicago. Notify National Importing & Trading Company. Phone them. They probably will change shipping instructions. This satisfactory to us. Advise.

KOCKOS BROTHERS.”

I sent that telegram because Itoh & Company insisted on shipping instructions and I wanted the bill of lading. A 38/40 peanut would comply with a contract calling for 40 count average, but a 36/38 peanut would not.

The COURT.—No, no, that isn't the question.

Mr. BROWNSTONE.—Your Honor, I don't like to pursue the inquiry, but I haven't yet been able

(Testimony of Andrew Kockos.)

to find out from the witness in what respects it does comply or in what respects it does not. Perhaps your Honor can help me in the matter.

The COURT.—Q. Here is a contract calling for a 40 average. A. Yes.

The COURT.—Q. Bearing that in mind, according to the practice or custom of the trade would a tendered delivery of peanuts of 38–40 meet the requirements of this contract calling for a 40 average?

A. Yes, that would pass all right. That would go for a shipment of 38–40's.

Mr. BROWNSTONE.—Q. If it was 36–38 would it comply? [85] A. It wouldn't comply; no.

Q. Why would the 38–40 comply and not the 36–38?

A. Because the manufacturer uses the particular size, 38–40s, for particular or certain purposes, and that is why they specify the particular sizes that they want; otherwise, it would say "We buy a hundred tons of peanuts," and not specify anything. The only way is to describe or specify the particular counts, and there is a certain price and certain limit to this commodity, of peanuts, that cannot otherwise be identified unless they have the particular sizes in the contract.

Q. Isn't it a fact that a 36–38 peanut and a 38–40 peanut are simply averaging the size of the peanuts in the ounce? In the ounce of peanuts they average the size, don't they? A. Yes, sir.

Q. Isn't it a fact you will find a number of pea-

(Testimony of Andrew Kockos.)

nuts in a 36-38 count that are identically the size of those in 38-40 count?

A. No, I couldn't say that, because you have to take less peanuts to make the weight.

Q. You don't mean to tell us that every peanut in a 36-38 is a different size than every peanut in a 38-40, do you?

A. They are not different by looks, but the weight isn't there.

Q. The total weight isn't there, but you don't mean each individual peanut in a 36-38 is a different size from the peanuts in a 38-40, do you?

A. Well, of course, that would be a pretty close question to say one way or the other, for the reason, as I said to you, they take so many samples from so many bags to get that particular count, and, naturally, when you take and put on your table ten or fifteen samples of 36-38's and 38-40's, you can easily tell the difference.

Mr. BROWNSTONE.—That is all. [86]

Mr. PARTRIDGE.—That is all. Mr. Courreges.

**Testimony of J. S. Courreges, for Defendants (Recalled).**

J. S. COURREGES, a witness for defendants, heretofore sworn, being recalled, testified as follows:

I looked up my records as to market price of peanuts in April and May, 1920. I find that on April 24, we sold 38/40's at \$9.50 per hundred, duty paid f. o. b. cars San Francisco; April 30th, \$9.25; May 5th, \$9.50; May 15th, \$9.50.



(Testimony of Harry Kockos.)

Cross-examination.

The sale on May 15th was a 50-ton lot. The others were from one to two cars. My records do not show any steady decline in the price. The Chicago market is based on the Pacific Coast market. [87]

**Testimony of Harry Kockos, for Defendants.**

HARRY KOCKOS, a witness for defendant, being first duly sworn, testified as follows:

I am one of the firm of Kockos Brothers, defendants here. I have shipped hundreds of cars to Chicago. It takes from 10 to 20 days for a car to go from Seattle to Chicago, the average being about 15 days.

(Here plaintiff and defendants rest.)

After argument to the jury by attorneys for plaintiff and defendants, the Court instructed the jury as follows:

**Charge to the Jury.**

The COURT.—Gentlemen of the jury, my instructions to you will be comparatively brief. As you have been advised, the plaintiff comes into court here suing for what is ordinarily referred to as a breach of contract for the sale of merchandise. The contract has been read to you, and, so far as most of its terms are concerned, they are not in dispute, there being but one clause, or phrase, of the contract in controversy. The contract, as you have heard, is for the sale of approximately 100 tons of Chinese shelled peanuts, of a certain crop



and quality, and the size is described as being 40-count average; and that is one phrase, or clause, to which your attention has been directed, and to which your attention will probably be directed by these instructions. The defendant admits the execution of this contract; and it also admits that it declined to accept the peanuts which the plaintiff tendered to it; the defense being that the nuts were not the 40-count average size, that being the only defense. In such case the burden is upon the plaintiff to show, by a preponderance of the evidence, that it tendered substantially what the contract [88] calls for, or, if it did not tender precisely what the contract calls for, that the defendant waived its right to reject the offer, and in fact accepted the tendered article in fulfillment of the contract.

Generally speaking, I have to say to you that a party to a contract cannot, and the plaintiff here could not, tender something other than the precise thing called for by the contract, claimed to be as good, or better, and demand the acceptance thereof. It must tender what it contracted to deliver unless, as already suggested, the defendant, with full knowledge of the facts, waives the objection and accepts the substituted article as a fulfillment of the obligation of the other party to the contract. As you have heard here, the contract calls for a 40-count average. Some testimony was admitted as to the custom of the import trade in peanuts, the wholesale trade, of the meaning of this phrase as the same is understood by men engaged in the

trade. This testimony, gentlemen, was not offered or received for the purpose of changing the contract, or justifying you or me in changing or altering the contract, or relieving either party from the obligation thereof, but merely to assist us in determining what the contract is, and whether the peanuts tendered by the plaintiff were within the terms thereof as the same was understood and entered into by the parties. In other words, this testimony was received for the purpose of throwing light upon the meaning of this phrase, not of changing it or modifying it in any way, but of finding out what its meaning was, for the purpose of finding out what the parties really agreed upon and what their contract and obligations were.

It is conceded by the defendant that, as such a contract, or such a phrase, is understood in the trade, it is not necessary that the nuts average precisely 40 to the ounce, but [89] that 38-40, as they are called, would be regarded as meeting the requirement, or the demand, of such phrase. And the defendants further contend that any larger nut than 38's would be beyond the meaning of this phrase, or be without its meaning, and, hence, would not meet the requirements. The plaintiff, on the other hand, contends to the contrary, and has introduced witnesses whose testimony tends to show that the count 40 average is understood in the trade to be only a limit to the smallness of the nuts; and that under such a contract it is the common understanding and custom that a slightly larger nut is deliverable; and that

not only 38-40's but that 36-38's are deliverable, and are customarily delivered and accepted under such a contract as being in fulfillment thereof. There is that difference, you will see, one party contending that 38-40's fulfilled the contract, and the other party, the plaintiff, contending that not only 38-40's would fulfill it, as is the common understanding, but that even a slightly larger nut, a 36-38, would be regarded as complying with the terms. It is for you to say upon which side of this particular issue the truth lies. If, from the evidence, you believe that, under trade customs and practice, the parties, when they entered into this contract, intended and understood that it called for a 40-count average, and that it was merely a limit upon the smallness, that it couldn't be smaller than 40, and that it would be satisfied by 38-40's, and also 36-38's, a slightly larger nut, then you will find for the plaintiff, for, in that contingency, it is submitted that the plaintiff tendered such a nut as was called for by the contract, that is, upon the assumption that it means 36-38's as well as 38-40's. If, upon the other hand, you find that the 36-38's did not meet the clause of the contract as it was understood by both parties [90] when it was entered into, and by the custom and practice of the trade, to which I have adverted, then you will consider plaintiff's contention of a waiver and acceptance by the defendant, for one party to the contract, that is, the purchaser under a contract, who has the right to demand goods of a certain class or quality, may

waive some defect or objection upon that ground and accept the goods of a somewhat different type or quality, in fulfillment of the contract. You have heard the testimony upon this point, and the discussion of counsel, tending to illuminate it; and you will say whether or not, with knowledge of the facts, the defendant did in fact waive such objection, if any there might be upon this ground, and did in fact accept the tendered nuts as being in full compliance with the obligations of the plaintiff to deliver under the contract. If you find that such an acceptance was in fact and intelligently made, then the defendant would be bound just the same as if such nuts were originally agreed upon. If, upon the other hand, you find that there was no waiver and acceptance, and you find that the nuts were not in accordance with the clause of the contract as understood by the parties, then your verdict should be for the defendant, absolutely; but if you find for the plaintiff, under the instructions I have given you, the next question is as to the amount of its damages.

Generally speaking, gentlemen, the measure of damages in such case is the difference between the price that the plaintiff was to receive under the contract, and the price which could be, and was reasonably, received upon the market for the merchandise, less the expense reasonably and necessarily incurred in taking the nuts to the market and in marketing them, [91] preserving them of course, where it is necessary to preserve them for a given length of time, and warehouse charges



where a warehouse is necessary, and all expenses reasonable and necessary in caring for and in marketing the nuts. In other words, the theory is that in such a case the party who has been wronged, the party whose contract has not been fulfilled by the other party, should be made whole, and should receive what is reasonably necessary to make him whole, and to give him what he would have received under the contract. Have you a form of verdict, Mr. Clerk?

The CLERK.—Yes, your Honor.

The COURT.—I should say to you gentlemen that it is necessary that all of you concur in finding a verdict. Two forms have been prepared. One you will use in case you find for the defendant. No blank is left in that. Your foreman will simply sign it when you have agreed, if you do agree. And the other form is to use in case you find for the plaintiff, and a blank is left in that form in which you will insert the amount of damages which you may find due to the plaintiff. You will understand that you are to be kept together now, gentlemen, and you will retire in charge of the bailiff.

Mr. BROWNSTONE.—Your Honor, will you allow us an exception to the instructions which you haven't given?

Mr. PARTRIDGE.—And would your Honor permit us an exception to your Honor's instruction with regard to the waiver, and in connection with that an exception to the failure to charge the jury as



to the effect of the Chamber of Commerce certificates.

The COURT.—I will call the jury back, if necessary. Do you think that is material?

Mr. PERRY.—Yes, your Honor.

Mr. PARTRIDGE.—I thought so, that there can be no waiver [92] without the Chamber of Commerce certificate, in other words. We have in the proposed instructions cited a large number of authorities—

The COURT.—There is no question of the correctness of your view, that the certificates of the Chamber of Commerce is controlling upon the question of the count, but there is no difference between you as to the count, I understand. Your witnesses all agree that the count doesn't come up to 40, and you agree that some of the nuts are only 36-38's, and I can't see how the certificate cuts any figure.

Mr. PARTRIDGE.—My thought about it was that there could be no waiver without knowledge, of course, and that the only knowledge that they were entitled to rely upon was the knowledge in the Chamber of Commerce certificates, and, therefore, there couldn't be any waiver unless it was shown that they had the Chamber of Commerce certificates.

Mr. BROWNSTONE.—If they had the same knowledge that was in the Chamber of Commerce certificates—why they could know anything if they knew the facts. At any rate, I thought, as a matter of law, they had waived it, because there was

no dispute about the fact that they knew it was a 37 count, and, knowing it was a 37 count, they accepted the delivery of it.

The COURT.—I don't know just what instruction to give to the jury upon that. Of course, to begin with, I intended to give such an instruction, but when it turned out there was no dispute about the count—

Mr. BROWNSTONE.—I don't see how that can affect it because your Honor has instructed the jury now that if under the contract they were entitled to get a 38–40 nut then they should bring in a verdict for the defendant. You have stated that in so many words. [93]

Mr. PARTRIDGE.—That isn't the point. The point that I had in mind was this, that the claim is made that this telegram conveyed them information and with that information in mind, by giving shipping instructions, they waived the count of the peanuts. It would seem to me that we would be entitled to an instruction that they were entitled to rely upon the Chamber of Commerce certificate and not upon this outside information which they obtained and until they got the Chamber of Commerce certificate they couldn't waive the—

The COURT.—The real point is then that they couldn't waive their right to see what the contract called for until they got the Chamber of Commerce certificate?

Mr. PARTRIDGE.—That is it, exactly.

The COURT.—I think I shall deny the request,

and you may have your exception. I think they could waive anything—that they could waive the certificate, and they could waive the information to be gotten in the certificate, if they so desired. Now, Mr. Brownstone, you, in some general way, excepted to the instructions not given?

#### EXCEPTION No. 8.

Thereupon the jury retired and returned the following verdict:

“We, the jury, find in favor of the plaintiff, and assess the damages against the defendants in the sum of \$8,500.”

Whereupon the Court granted to the defendants a stay of execution for 15 days.

The above and foregoing comprises all the proceedings upon the trial of the said cause. [94]

### **Specifications of Particular Errors of Law.**

#### I.

That the Court erred in refusing to permit the defendants herein to file their demurrers and in refusing to consider their demurrers herein.

#### II.

That the complaint of plaintiff on file herein does not state facts sufficient to constitute a cause of action against these defendants or either of them.

#### III.

The Court erred in admitting evidence of the custom of the trade to the effect that peanuts 36/38 count complied with the terms of the contract providing that the peanuts should be 40 count in this, that the contracts specifically provided that the

peanuts should be 40 count, and that the Chamber of Commerce certificate should be final.

#### IV.

The Court erred in denying defendants' motion for a nonsuit in this, that the plaintiff's evidence showed that the contract was for peanuts 40 count, Chamber of Commerce certificate to be final, and the plaintiff's evidence showed that 1600 out of the 2000 bags were 36/38 count and the Chamber of Commerce certificate shows that the same were 36/38 count.

#### V.

The Court erred in denying defendant's motion for a nonsuit as to 400 bags of the peanuts involved in the said contract in this, that the plaintiff's evidence shows that 400 bags of said peanuts complied with the said contract and that the defendant offered to accept and pay for said 400 bags and plaintiff refused and sold the same. [95]

#### VI.

The Court erred in refusing to allow testimony of defendants as to contract with the National Importing and Trading Company in this, that it was preliminary to evidence showing a specific instance of refusal to accept 36/38 count peanuts on a contract calling for 40-count average as bearing on the general trade custom.

#### VII.

That the Court erred in refusing testimony of defendants showing that the National Importing and Trading Company was located in Chicago in this, that it was evidence tending to show lack of



knowledge of said company that the peanuts were not 40 count and therefore that there was no waiver of the defect.

### VIII.

That the Court erred in refusing evidence of defendants showing rejection of the 1600 bags of peanuts by National Importing and Trading Company because they were not 40 count in this, that said evidence tended to prove the general custom of the trade as to such practice.

### IX.

The Court erred in refusing evidence of defendants as to what information defendant was relying on when he gave shipping instructions to plaintiff in this, that said testimony tended to prove that defendant had no knowledge of the variation of the size of the peanuts from the contract count and so did not waive the defect.

### X.

The Court erred in refusing to instruct the jury that the Chamber of Commerce certificates as to count were final and the only information upon which defendants could rely as to the count in accordance with request of defendants, in this, that the contract stated that the Chamber of Commerce certificates as to count should be final and [96] defendant having given shipping orders before knowing what the Chamber of Commerce certificates showed as to count could not have had knowledge of the defect and hence could not have waived the defect.



XI.

The Court erred in failing to instruct the jury to find for the defendants in accordance with the request of said defendants.

IT IS HEREBY STIPULATED that the above and foregoing may be settled and allowed as and for the bill of exceptions herein and that the same may be signed by the trial Judge outside of the District without objection; or may be settled and signed by any Judge of this court in San Francisco, California.

BROWNSTONE & GOODMAN,

Attorneys for Plaintiff.

RAYMOND PERRY,

MASTICK & PARTRIDGE,

JOHN S. PARTRIDGE,

Attorneys for Defendants.

The foregoing bill of exceptions is hereby settled and allowed.

Dated: 1st day of September, 1922.

E. S. FARRINGTON,

Judge.

[Endorsed]: Filed Sep. 2, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [97]

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(Title of Court and Cause.)

**Petition for Allowance of Writ of Error.**

Now come Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros., defend-

ants in the above-entitled action, by their attorneys and respectively show:

That on, to wit, the 7th day of June, 1922, the jury in the above-entitled cause rendered its verdict in favor of the said plaintiff C. Itoh & Co., and against said defendants; on, to wit, the 7th day of June, 1922, final judgment was made and entered in the above-entitled action in favor of the above plaintiff and against the said defendants; your petitioners, feeling aggrieved with the said judgment, herewith petition for an order to allow them to prosecute a writ of error to the United States Circuit Court of Appeal in and for the Ninth Circuit, under the laws of the United States in such cases made and provided;

WHEREFORE, the premises considered, your petitioners pray that a writ of error in their behalf to the United States Circuit Court of Appeal, Ninth Circuit, sitting in the City and County of San Francisco, State of California, in and for said Circuit, for the correction of errors committed by said Court at said trial and said verdict and in entering said judgment, for the reason set forth in petitioners' assignment of errors filed therein, and that a transcript of the record, proceedings and papers upon which said trial was had and judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeal for the Ninth Circuit, and your petitioners will ever pray.

RAYMOND PERRY,

JOHN S. PARTRIDGE,

Attorneys for Petitioners. [98]

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [99]

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(Title of Court and Cause.)

### **Assignment of Errors.**

Now come the defendants in the above-entitled cause and file the following assignment of errors upon which they will rely in the prosecution of their writ of error to review a final judgment made and entered against them on the 7th day of June, 1922, in the above-entitled action.

#### **I.**

That the Court erred in refusing to permit the defendants herein to file their demurrers and in refusing to consider their demurrers herein.

#### **II.**

That the complaint of plaintiff on file herein does not state facts sufficient to constitute a cause of action against these defendants or either of them.

#### **III.**

The Court erred in admitting evidence of the custom of the trade to the effect that peanuts 36/38 count complied with the terms of this contract providing that the peanuts should be 40 count in this, that the contracts specifically provided that the peanuts should be 40 count, and that the Chamber of Commerce certificate should be final.

#### **IV.**

The Court erred in denying defendants' motion

for a nonsuit in this, that the plaintiff's evidence showed that the contract was for peanuts 40 count, Chamber of Commerce Certificate to be final, and the plaintiff's evidence showed that 1600 out of the 2000 bags were 36/38 count and the Chamber of Commerce certificates shows that the same were 36/38 count. [100]

#### V.

The Court erred in denying defendants' motion for a nonsuit as to 400 bags of the peanuts involved in the said contract in this, that the plaintiff's evidence shows that 400 bags of said peanuts complied with the said contract and that the defendants offered to accept and pay for the said 400 bags and plaintiff refused and sold the same.

#### VI.

The Court erred in refusing to allow testimony of defendants as to contract with National Importing and Trading Company in this, that it was preliminary to evidence showing a specific instance of refusal to accept 36/38 count peanuts on a contract calling for 40 count average as bearing on the general trade custom.

#### VII.

That the Court erred in refusing testimony of defendants showing that the National Importing and Trading Company was located in Chicago, in this, that it was evidence tending to show lack of knowledge of said company that the peanuts were not 40 count and therefore that there was no waiver of the defect.

## VIII.

That the Court erred in refusing evidence of defendants showing rejection of the 1600 bags of peanuts by National Importing and Trading Company because they were not 40 count in this, that said evidence tended to prove the general custom of the trade as to such practice.

## IX.

The Court erred in refusing evidence of defendants as to what information defendant was relying on when he gave shipping instructions to plaintiff in this, that said testimony tended to prove that defendant had no knowledge of the variation of the size of the peanuts from the contract [101] count and so did not waive the defect.

## X.

The Court erred in refusing to instruct the jury that the Chamber of Commerce certificates as to count were final and the only information upon which defendants could rely as to the count in accordance with request of defendants, in this, that the contract stated that the Chamber of Commerce certificates as to count should be final and defendant having given shipping orders before knowing what the Chamber of Commerce certificates showed as to count could not have had knowledge of the defect and hence could not have waived the defect.

## XI.

The Court erred in failing to instruct the jury to find for the defendants in accordance with the request of said defendants.



WHEREFORE, defendants pray that said judgment be reversed and that this action be remanded to the Southern Division of the District Court of the United States, for the Northern District of California, Second Division, directing the said Court to retry said action on all the issues raised by the pleadings herein.

RAYMOND PERRY,  
JOHN. S. PARTRIDGE,  
Attorneys for Defendants.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

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(Title of Court and Cause.)

**Order Allowing Writ of Error and Fixing Bond.**

Upon reading and filing the petition for writ of error of the said defendants in the above-entitled cause, as likewise the prayer for reversal of the judgment heretofore entered,—

IT IS ORDERED that said writ of error be and it is hereby allowed and the bond is fixed at the sum of Three Hundred Dollars (\$300.00).

Dated: June 7, 1922.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [103]

(Title of Court and Cause.)

**Appeal Bond.**

KNOW ALL MEN BY THESE PRESENTS: THAT WHEREAS, in an action in the District Court of the United States in and for the Northern District of California, Southern Division, a judgment was on the 7th day of June, 1922, rendered in favor of the above-named plaintiff and against the above-named defendants in said cause;

AND WHEREAS, the said defendants are dissatisfied with said judgment and are desirous of reversing the same, and to that end have sued out and been allowed a writ of error addressed to said above-entitled court, for the purpose of reviewing and reversing the said judgment:

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES and of such Writ of Error, we, the undersigned, John Cosmos of San Francisco, California, and Joseph Hurych of Oakland, California, both residents, householders and freeholders in said Northern District of California, are held and firmly bound and do hereby jointly and severally undertake in the sum of Three Hundred Dollars (\$300.00), and promise on behalf of the defendants in the above-entitled cause that said defendants will pay all damages and costs which may be awarded against them on said writ of error, or the affirmance of said judgment, or on a dismissal of said writ of error, not exceeding the aforesaid sum of Three Hundred Dollars

(\$300.00), to which amount they and each of them acknowledge themselves bound.

AND THE SAID SURETIES do further agree that in the event of a breach of any condition hereof, and if the said defendants herein shall not successfully prosecute their writ of error, [104] or if the same be dismissed, then the above-entitled court may, upon notice to us, the said sureties, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which we, the said sureties, are bound to pay on account of said breach and render judgment therefor against us and award execution therefor.

JOHN COSMOS. (Seal)

JOSEPH HURYCH. (Seal)

United States of America,  
Northern District of California,  
State of California,  
City and County of San Francisco,—ss.

John Cosmos and Joseph Hurych, being first duly sworn, each separately and not one for the other allege that each of them is a resident and householder and freeholder within the Northern District of California and that each of them is worth the amount specified in the above bond or undertaking over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN COSMOS.

JOSEPH HURYCH.

Subscribed and sworn to before me this 26th day of June, 1922.

[Seal]

W. H. PYBURN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Approved:

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [105]

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(Title of Court and Cause.)

**Order for Supersedeas.**

IT APPEARING TO THE COURT that the defendants in the above-entitled cause have duly and regularly filed their petition for a writ of error to reverse the judgment of said Court in said action, together with their assignment of errors and a prayer for reversal, and all and singular the premises having been considered,—

IT IS ORDERED that said judgment be, and it is hereby, suspended and superseded upon the execution by said defendants of an undertaking to be approved by me, a Judge of said court, with two sufficient sureties, in accordance with Rules 70 and 71 of this court, in the sum of Ten Thousand Dollars (\$10,000.00).

Dated: June 7, 1922.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [106]

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(Title of Court and Cause.)

**Supersedeas Bond.**

KNOW ALL MEN BY THESE PRESENTS:  
THAT WHEREAS, in an action in the District  
Court of the United States, in and for the Northern  
District of California, Southern Division, a judgment was on the — day of June, 1922, rendered in favor of the above-named plaintiff, C. Itoh & Co., and against the above-named defendants, Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros., a partnership;

AND WHEREAS, defendants are dissatisfied with said judgment and are desirous of reversing the same, and to that end have sued out and been allowed a writ of error addressed to said above-entitled court for the purpose of reviewing and reversing said judgment;

AND WHEREAS, the amount of said judgment is the sum of Eighty-five Hundred Dollars, (\$8500.00);

AND WHEREAS, the above-entitled Court has made an order for a supersedeas in said cause upon the execution by said defendant, Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros. and Kockos Bros., a partnership, of an undertaking



in accordance with Rules 70 and 71 of said Court, in the sum of Ten Thousand Dollars (\$10,000.00);

NOW THEREFORE, IN CONSIDERATION OF THE PREMISES and of the said writ of error and supersedeas, we, the undersigned, John Cosmos and Gust Contos, both of San Francisco, California, both residents, householders and freeholders of the City and County of San Francisco, in said Northern District of California, are held and firmly bound and do hereby jointly and severally undertake in the sum of Ten Thousand Dollars (\$10,000.00), and promise on behalf of the defendants in said United States [107] District Court, and the said writ of error, that the said defendants will pay the said judgment, together with interest thereon and all costs and damages in the event that said judgment is affirmed, or on a dismissal of said writ of error, not exceeding the aforesaid sum of Ten Thousand Dollars (\$10,000.00), to which amount they, and each of them, acknowledge themselves bound.

AND THE SAID SURETIES do further agree that in the event of a breach of any condition hereof, and in the event that the said defendants herein should not successfully prosecute their writ of error, or if the same be dismissed, then the above-entitled court may, upon notice to us, the said sureties, of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount which we, the said sureties, are bound to pay on account of said breach, and render judg-

ment therefor against us and award execution therefor.

JOHN COSMOS.

GUST CONTOS.

United States of America,  
Northern District of California,  
State of California,  
City and County of San Francisco,—ss.

John Cosmos and Gus Contos, being first duly sworn, each separately and not one for the other, allege:

That each of them is a resident, householder and freeholder within the Northern District of California, and that each of them is worth the amount specified in the above bond or undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN COSMOS.

GUST CONTOS.

Subscribed and sworn to before me this 21st day of June, 1922.

[Seal]

W. H. PYBURN,

Notary Public in and for the City and County of  
San Francisco, State of California.

Approved:

M. T. DOOLING,

Judge. [108]

[Endorsed]: Filed Jul. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [109]

(Title of Court and Cause.)

**Praeipce for Record on Writ of Error.**

To the Clerk of Said Court:

Sir: Please prepare record on writ of error and incorporate therein the following:

1. Judgment-roll.
2. Bill of Exceptions.
3. Petition for Allowance of Writ of Error.
4. Assignment of Errors.
5. Order Allowing Writ of Error, etc.
6. Appeal Bond.
7. Order for Supersedeas.
8. Supersedeas Bond.
9. Praeipce for Record.
10. Original Writ of Error and Citation on Writ of Error.

JOHN S. PARTRIDGE,  
Attorney for Defendants.

[Endorsed]: Filed Sept. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

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(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred ten (110) pages, numbered from 1 to 110, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the

praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$50.60; that said amount was paid by the defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 25th day of September, A. D. 1922.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [111]

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### **Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to  
the Honorable, the Judges of the District Court  
of the United States for the Northern District  
of California, Second Division.

GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros.,

a partnership, plaintiffs in error and C. Itoh & Co., a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Harry Kockos and Andrew Kockos, copartners doing business under the firm name and style of Kockos Bros., and Kockos Bros., a partnership, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States,



the 7th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by:

M. T. DOOLING,  
United States District Judge. [112]

### RETURN TO WRIT OF ERROR.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]                      WALTER B. MALING,  
Clerk U. S. District Court, Northern District of  
California.

[Endorsed]: No. 16,454. United States District Court for the Northern District of California, Second Division, C. Itoh & Co., a Corporation, Plaintiff in Error, vs. Harry Kockos and Andrew Kockos, Copartners Doing Business Under the

Firm Name and Style of Kockos Bros., and Kockos Bros., a Partnership, Defendants in Error. Writ of Error. Filed Jul. 8, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of copy of the within writ of error is acknowledged this 8th day of July, 1922, is hereby admitted.

**BROWNSTONE & GOODMAN.**

Attorneys for Plaintiff.

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**Citation on Writ of Error.**

**UNITED STATES OF AMERICA,—ss.**

The President of the United States, to C. Itoh & Co., a corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Harry Kockos and Andrew Kockos, co-partners doing business under the firm name and style of Kockos Bros., and Kockos Bros., a partnership, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 7th day of July, A. D. 1922.

M. T. DOOLING,  
United States District Judge. [113]

Receipt of copy of the within Citation on Writ of Error and this 8th day of July, 1922, is hereby admitted.

BROWNSTONE & GOODMAN,  
Attorneys for Plaintiff.

[Endorsed]: No. 16454. United States District Court for the Northern District of California, Second Division. C. Itoh & Co., a Corporation, Plaintiff in Error, vs. Harry Kockos and Andrew Kockos, Copartners Doing Business Under the Firm Name and Style of Kockos Bros., and Kockos Bros., a Partnership, Defendants in Error. Citation on Writ of Error. Filed Jul. 8, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed: No. 3926. United States Circuit Court of Appeals for the Ninth Circuit. Harry Kockos and Andrew Kockos, Copartners Doing Business Under the Firm Name and Style of Kockos Bros., and Kockos Bros., a Partnership, Plaintiffs in Error, vs. C. Itoh & Co., Ltd., a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of

the Northern District of California, Second Division.

Filed September 25, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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United States Circuit Court of Appeals for the  
Ninth Circuit.

HARRY KOCKOS and ANDREW KOCKOS,  
Copartners Doing Business Under the Firm  
Name and Style of KOCKOS BROS., and  
KOCKOS BROS., a Partnership,  
Plaintiffs in Error,

vs.

C. ITOH & CO., a Corporation,  
Defendant in Error.

**Order Extending Time to and Including September  
6th, 1922, to File Record on Writ of Error and  
to Docket Cause.**

Good cause being shown, it is hereby ordered  
that the plaintiffs in error in the above-entitled  
cause may have to and including September 6th,  
1922, within which to file the record on writ of  
error and docket the cause in the United States  
Circuit Court of Appeals for the Ninth Circuit.

Dated: August 5th, 1922.

WM. W. MORROW.

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 3926. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Sept. 6, 1922, to File Record and Docket Cause. Filed Aug. 5, 1922. F. D. Monckton, Clerk. Refiled Sept. 25, 1922. F. D. Monckton, Clerk.

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United States Circuit Court of Appeals for the Ninth Circuit.

HARRY KOCKOS and ANDREW KOCKOS,  
Copartners Doing Business Under the Firm  
Name and Style of KOCKOS BROS., and  
KOCKOS BROS., a Partnership,  
Plaintiffs in Error,  
vs.

C. ITOH & CO., a Corporation,  
Defendant in Error.

**Order Extending Time to and Including October 6th, 1922, to File Record on Writ of Error and to Docket Cause.**

Good cause being shown, it is hereby ordered that the plaintiffs in error in the above-entitled cause may have to and including October 6th, 1922, within which to file the record on writ of error



and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: September 6, 1922.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 3926. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including ———, 192—, to File Record and Docket Cause. Filed Sept. 6, 1922. F. D. Monckton, Clerk. Refiled Sept. 25, 1922. F. D. Monckton, Clerk.



No. 3926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY KOCKOS and ANDREW KOCKOS, copart-  
ners doing business under the firm name  
and style of Kockos Bros. and Kockos  
BROS. (a partnership),

*Plaintiffs in Error,*

VS.

C. ITOH & Co., LTD. (a corporation),

*Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN S. PARTRIDGE,

RAYMOND PERRY,

*Attorneys for Plaintiffs in Error.*

FILED  
FEB 14 1923  
P. B. MONTGOMERY  
CLERK



No. 3926

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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HARRY KOCKOS and ANDREW KOCKOS, copartners doing business under the firm name and style of Kockos Bros. and KOCKOS BROS. (a partnership),

*Plaintiffs in Error,*

VS.

C. ITOH & Co., LTD. (a corporation),

*Defendant in Error.*

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## BRIEF FOR PLAINTIFFS IN ERROR.

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This is an appeal of Harry Kockos (et al.) from the judgment on verdict of the Southern Division of the United States District Court of the Northern District of California, Second Division, in favor of defendant in error and against plaintiffs in error.

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### Statement of the Case.

The parties to this action entered into a merchandise contract, wherein the defendant in error sold,



and the plaintiffs in error purchased, approximately 100 tons Chinese shelled peanuts, 40 count average. The contract (page 3) provided that the "Seattle Chamber of Commerce Certificate of Inspection final as to crop, count, quality and condition."

Defendants in error alleged that it

"has in all respects complied with the terms and conditions of the aforesaid contract on its part to be performed and upon arrival of said peanuts from the Orient in early March, 1920, tendered and offered to deliver to the said defendants the said 100 tons of Chinese shelled peanuts as described in the aforesaid contract and the said defendants inspected and examined the same and after such inspection and examination, the said defendants requested the plaintiff to ship the same to Chicago, Illinois, from Seattle, Washington" (page 4).

Plaintiffs in error denied that plaintiff has in all respects, or in any way, or at all, complied with the terms and conditions of the contract on its part to be performed. They denied that plaintiff tendered or offered one hundred tons Chinese shelled peanuts as described in the contract, or any peanuts of 40 count average. They alleged that upon the representation of the plaintiff that the peanuts were of 40 count average, they gave the shipping instructions.

That when defendant in error presented its invoice for 38/40 count peanuts with the Seattle Chamber of Commerce Certificate of Inspection, the plaintiffs in error for the first time discovered that

the count of the peanuts tendered were an average of 37 count (pages 16 and 17).

By way of special defense plaintiffs in error set up that the contract was for 40 count average and that the Seattle Chamber of Commerce Certificate of Inspection was final as to crop, count, quality and condition. That they refused delivery upon ascertaining that the Seattle Chamber of Commerce Certificate specified the count to be 37 (page 20).

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### **Issue.**

This appeal presents the following issues:

1st. Is a contract, providing for a Chamber of Commerce Certificate final as to count, binding upon both parties?

2nd. Did the trial court err in refusing to grant the motion for non-suit upon the ground that the evidence established that the defendant in error did not comply with the contract in that it tendered goods of a different count from those which the contract called for?

3rd. Did the trial court err in refusing to grant a non-suit as to the 400 bags of peanuts which did comply with the contract, when the evidence established that plaintiffs in error offered to accept the 400 bags and that defendant in error refused to deliver them? (page 84).

4th. Did the trial court err in admitting testimony to establish a custom to vary the terms of a written contract?

5th. Was there a waiver by plaintiffs in error?

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### Points and Authorities.

#### I.

**A CONTRACT FOR 40 COUNT AVERAGE, CHAMBER OF COMMERCE CERTIFICATE FINAL AS TO COUNT, IS BINDING UPON BOTH PARTIES.**

In *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274 at page 279, the State Supreme Court said:

"The contract provided in express terms that the decision of Hollihan or such other grader as might be designated should 'be final and conclusive upon the parties' with respect to the grades of the lumber. Nothing is better settled than the rule *that where the parties agree that the performance or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding in the absence of fraud or mistake.* (9 Cyc. 617; *Palmer v. Clark*, 106 Mass. 373; *Nofsinger v. Ring*, 71 Mo. 149, 36 Am. Rep. 456; *Moore v. Kerr*, 65 Cal. 517, 4 Pac. 542; *Dunstan v. McAndrew*, 44 N. Y. 72; *City St. Imp. Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308; *American Haw. E. & C. Co. v. Butler*, 165 Cal. 497, 133 Pac. 280.) The 'mistake' which will justify an impeachment of the arbiter's decision is not mere error of judgment, but is the kind of mistake which 'amounts to fraud'."

In the case of *Standard Oil Co. v. VanEtten*, 107 U. S. 327-330, the Supreme Court affirmed a judgment approving of the same doctrine. The court stated:

“The Court charged the Jury, in substance, that, by the terms of the contract, as modified on April 1, 1874, the heading became the property of the Standard Oil Company, on delivery at Lapeer on land leased by it, but subject to their inspection and count at Cleveland; *that, if that count was made fairly and in the exercise of the best judgment of the inspector, it would be binding on the plaintiff*, unless its variance from the actual truth was too great to be accounted for by any error of Judgment, in which case the plaintiff was not precluded from showing a mistake; that if upon all the evidence, the jury should be unable to determine whether there was fraud or mistake in the count upon either side.”

In the case at bar defendant in error made no attempt to prove fraud or mistake. Therefore, the Seattle Chamber of Commerce Certificate was final and binding upon both of the parties.

The trial court, therefore, erred when it refused to give either of the two instructions requested by plaintiffs in error declaring the certificate to be final and binding upon defendant in error.

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## II.

### . REFUSAL TO GRANT THE NON-SUIT (1600 BAGS).

The evidence having clearly established that the count on 1600 bags was 37—the Seattle Chamber of

Commerce Certificate having established that fact—the court should have granted the non-suit.

The tender of a larger count, even though it might be considered a better grade of peanut, cannot constitute performance of the contract.

In the case of *Norrington v. Wright*, 115 U. S. 188-203, the Supreme Court stated:

“A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which the term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 B. & S. 751; *Bowes v. Shand*, 2 App. Cases 455; *Lowher v. Bangs*, 2 Wall. 728, 69 U. S. bk., 17 L. ed. 768; *Davison v. Van Lingen*, 113 U. S. 40.”

In the instant case the count was a material part of the contract, and a third parties' inspection was made final. Defendant in error, therefore, failed to perform a condition precedent on its part to be performed.

On page 208 the court quotes Lord Chancellor Cairns:

“It does not appear to me to be a question for your Lordships, or for any court to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile



contract, and the merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance. \* \* \* Plaintiff who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfillment of the contract."

In quoting Lord Blackburn on page 209 the court says:

"If the description of this article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. \* \* \* But the parties have chosen for the reasons best known to themselves to say: We bargained to take rice shipped in this particular region at that particular time on board that particular ship, and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."

In the case of *Pacific W. C. Co. v. Western W. D. Co.*, 41 Cal. App. 696 at page 700, the appellate court declared:

"A buyer cannot 'be required to accept and pay for a thing different from that which he contracted to receive'. 'If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to

recover the price as money had and received for his use.' ”

In the case of *Vassau v. Campbell*, 81 N. W. 829 at page 830, the Supreme Court of the State of Minnesota stated:

“It must be held that the parties contracted with reference to this term as generally understood, and, so construed, the defendants agreed to deliver at least 50 head of cattle—steers and heifers—averaging in age from 10 to 18 months. A bunch of 50 cattle was in fact tendered, but less than a fourth were over 10 months old, and six of these were bulls. This would not be a compliance with the terms of the contract. So many 10 months cattle, but little better than calves, did not constitute in the whole bunch a fair average; and as further provided by the contract, and held by the court in the charge, the furnishing of the bulls instead of heifers or steers did not meet the requisites of the contract either. It is true that the defendants offered six two year olds in the place of the bulls, but the plaintiffs might have had their own reason for demanding a strict compliance with the contract, and they had a right to insist on the same against a different compliance in any respect which defendants were trying to make.”

Therefore plaintiffs in error were entitled to the article contracted for, to-wit: 40 count average. Defendant in error in making a tender of 37 count failed to perform a condition precedent. The trial court, therefore, erred in refusing to grant the motion for non-suit.

## III.

## MOTION FOR NON-SUIT (400 BAGS).

The evidence without conflict showed that 400 bags were 40 count; that the defendant offered to accept and pay for these 400 bags. This offer was made unconditional. In defendants in error's exhibit No. 19 (page 47) plaintiffs in error wired "five hundred sixty bags in order with contract". In defendants in error's exhibit No. 25 (page 51) plaintiffs in error wired:

"We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once."

Mr. Crandall, the traffic manager for defendant in error at Seattle, testified on cross-examination (page 62) as follows:

"Kockos Bros. offered to receive and pay for the 400 bags of 38/40's but the offer was refused. They were notified to pay for the entire contract or pay damages."

Even though the trial court on the motion stated (page 88):

"I will say to you, Mr. Brownstone, my impression is rather against you on that, but I will hear you a little further. I have difficulty in seeing why you should be unwilling to deliver the 400 bags if the offer to take them was unconditional. \* \* \* The motion will be denied, but as I say, without prejudice to a reconsideration of the question when it comes to instruct-

ing the jury what the measure of damages will be.”

The instruction as to damages appears on pages 116-117. No restriction was mentioned at all. The jury were instructed

“the party whose contract has not been fulfilled by the other party, should be made whole, and should receive what is reasonably necessary to make him whole, and to give him what he would have received under the contract.”

Plaintiffs in error, while they were perfectly willing to take the 400 bags which admittedly complied with their contract, were made to pay the loss of the vendor who held them during a broken market and sold the entire lot two months later upon a greatly weakened market.

There is nothing to support such an unjust award.

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#### IV.

#### THE TRIAL COURT ERRED IN ADMITTING TESTIMONY TO ESTABLISH CUSTOM TO VARY THE TERMS OF A WRITTEN CONTRACT.

Defendant in error produced witnesses to testify that a 40 count contract meant that the peanuts should not run over 40; that 36-38 count would be a good delivery under a 40 count average; that such is the general understanding of the trade.

This testimony was objected to and Exception No. 1 (page 77) and No. 2 (page 78) were taken.

The court instructed the jury:

“There is that difference, you will see, one party contending that 38-40’s fulfilled the contract, and the other party, the plaintiff, contending that not only 38-40’s would fulfill it, as is the common understanding, but that even a slightly larger nut, a 36-38, would be regarded as complying with the terms. It is for you to say upon which side of this particular issue the truth lies. If, from the evidence, you believe that, under trade customs and practice, the parties, when they entered into this contract, intended and understood that it called for a 40 count average, and that it was merely a limit upon the smallness, that it couldn’t be smaller than 40, and that it would be satisfied by 38-40’s, and also 36-38’s, a slightly larger nut, then you will find for the plaintiff, for, in that contingency, it is submitted that the plaintiff tendered such a nut as was called for by the contract, that is, upon the assumption that it means 36-38’s as well as 38-40’s.” (Page 115.)

As their third ground of the motion for non-suit, plaintiffs in error specified that where there are specific terms in a contract, limiting and defining the quality of the goods which are the subject of the contract, any custom inconsistent with the terms of that contract is not a proper subject matter of investigation, nor will it support an action based upon that contract.

In *Leonhardt v. Calif. Wine Assn.*, 5 Cal. App. 19-23, appellate court stated:

“The alleged custom would have limited the deliveries to one or two loads a day, and in that respect would have been inconsistent with the



written contract. A custom inconsistent with the terms of a written contract is not the proper subject matter of a defense. In the case of *Withers v. Moore*, 140 Cal. 591, 74 Pac. 159, the defendant contended that the contract sued upon was subject to a certain custom. In that case, pages 596, 597 of 180 Cal., pages 160, 161 74 Pac., it is said: 'The contract as made by the cablegrams and explained in the letter is not uncertain with respect to that point in question. It is a positive agreement by the defendant to buy the coal in question of the plaintiff at the price of twenty-four shillings and three pence per ton, to be delivered to him free of any expense of freight, insurance, exchange or duty, all of which were to be paid by the plaintiff. To attach to this contract the custom of San Francisco, the effect of which would be that if the cargo was not received until after July 1, 1894, the defendant would pay thirty-five cents less per ton than the price agreed upon, would be to vary the terms of a written contract by parol evidence. The Code provides that evidence may be given of "usage" to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.' (Code Civ. Proc., sec. 1870, subd. 12.) And in accordance with this principle it has been held that it is not competent to vary a written contract by parol proof of a custom where the contract is certain in its terms. (*Holloway v. McNear*, 81 Cal. 156 [22 Pac. 514]; *Milwaukee Co. v. Palatine Co.*, 128 Cal. 74 [60 Pac. 518]; *Ah Tong v. Earl Fruit Co.*, 112 Cal. 68 [45 Pac. 7]; *Burns v. Sennett*, 99 Cal. 363 [33 Pac. 916].)"

We submit that the rule declaring "It is not competent to vary a written contract by parol proof of

a custom where the contract is certain in its terms" is controlling, and clearly establishes the error committed.

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## V.

### WAIVER.

Defendant in error attempted to show a waiver by plaintiffs in error of the count because they had received a report of an inspector that his inspection showed 37 count. Defendant in error knew nothing of this report pending the transaction.

The testimony of George B. Graham (pages 63 to 66) shows that on March 10, 1920, his firm was requested by plaintiffs in error to inspect; that the telegram of March 10, 1920, Plaintiffs' Exhibit No. 29 was their report; that Itoh & Co. knew nothing of its work for Kockos Bros. during the month of March 1920.

Defendant in error throughout all its correspondence referred to the lot as 40 count. This was established by, Plaintiffs' Exhibit No. 4 (page 32) advising that the shipment left the Orient, Plaintiffs' Exhibit No. 5 advising of the arrival of the goods and Plaintiffs' Exhibit No. 9 asking for shipping instructions. After the Chamber of Commerce issues its certificate, Plaintiffs' Exhibit 13-B (page 40) for 37 count, on March 13, 1920, defendant in error continued to call the goods 40 count. Its invoice, Plaintiffs' Exhibit No. 17 (page 45), issued March 22, 1920, declares the 1600 bag lot to be 38/40 count.

Plaintiffs' Exhibit No. 18, a letter of March 27, 1920, called the count "forty".

When the documents were presented to plaintiffs in error in San Francisco on March 20, 1920, they ascertained for the first time that the Chamber of Commerce Certificate was for 37 count and immediately rejected the tender. See Plaintiffs' Exhibits No. 19 (page 47) and 22 (pages 49 and 50).

On cross-examination Mr. Kockos testified (pages 103 to 106) that he did not pay much attention to Graham's report of the count because the contract called for Chamber of Commerce Certificate to be final on the count.

Defendant in error claims that plaintiffs in error waived the right to object, even though defendant in error was cognizant of the fact at the time. It claims a waiver though the contract provides a third party's certificate should be final upon the subject. It claims a waiver even though, after obtaining knowledge of the defect, it failed to communicate that information to the other party. It claims a waiver even though after knowledge of its own breach it refers to the goods as 38/40, those called for by the contract. Is that the law of waiver?

The court throughout the instructions called the jurors' attention to the question of waiver.

"In such case the burden is upon the plaintiff to show, by a preponderance of the evidence, that it tendered substantially what the contract calls for, or, if it did not tender precisely what the contract calls for, that the defendant waived

its right to reject the offer, and in fact accepted the tendered article in fulfillment of the contract \* \* \*.

It must tender what it contracted to deliver unless, as already suggested, the defendant, with full knowledge of the facts, waives the objection and accepts the substituted article (page 113).

If, upon the other hand, you find that the 36-38's did not meet the clause of the contract as it was understood by both parties when it was entered into, and by the custom and practice of the trade, to which I have adverted, then you will consider plaintiff's contention of a waiver and acceptance by the defendant. (Page 115.)

The purchaser under a contract, who has the right to demand goods of a certain class or quality, may waive some defect or objection upon that ground and accept the goods of a somewhat different type or quality, in fulfillment of the contract. You have heard the testimony upon this point, and the discussion of counsel, tending to illuminate it; and you will say whether or not, with knowledge of the facts, the defendant did in fact waive such objection, if any there might be upon this ground, and did in fact accept the tendered nuts as being in full compliance with the obligations of the plaintiff to deliver under the contract. If you find that such an acceptance was in fact and intelligently made, then the defendant would be bound just the same as if such nuts were originally agreed upon." (Page 116.)

In the first place, there could be no waiver by plaintiffs in error until they received or were notified that the Chamber of Commerce Certificate was



37 count. The time of a breach of contract means the time when the breach was discovered.

*Shearer v. Park Nursery*, 103 Cal. 415;

*Germain Fruit Co. v. Armsby*, 163 Cal. 585-590.

Second: There can be no waiver of any right by a purchaser unless that waiver is made known to the seller and causes the seller to be misled or prejudiced by the acts of the buyer. The reason for this rule is to give the seller an opportunity of correcting the mistake or to tender the right thing where he has tendered the wrong thing.

*23 Ruling Case Law* 1435;

*Kofoed v. Gordon*, 122 Cal. 314-320.

Even though Graham had reported a 37 count, the Chamber of Commerce Certificate might have shown a 38/40 count. If it had, there would have been no breach.

The alleged waiver was not known by defendant in error. It suffered no loss nor was it prejudiced thereby. The testimony clearly shows that, even after it knew the Chamber of Commerce Certificate was for 37 count, it did not notify plaintiffs in error. That with this certificate in its possession it sent the telegram of March 15, 1920, Plaintiffs' Exhibit No. 9 (page 36), asking for shipping instructions. Had it wired at that time that the count was 37, it would never have had shipping instructions.

The record discloses no ground for the application of the doctrine of waiver, and the court erred in



presenting the question of waiver to the jury, especially since the court refused plaintiffs in error instructions upon the law of waiver.

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### **Conclusion.**

Plaintiffs in error therefore submit that the errors pointed out herein show that they failed to receive a fair trial upon the law. That the record does disclose a miscarriage of justice.

Therefore, they respectfully submit that the judgment should be set aside and vacated.

Dated, San Francisco,

February 10, 1923.

Respectfully submitted,

JOHN S. PARTRIDGE,

RAYMOND PERRY,

*Attorneys for Plaintiffs in Error.*



No. 3926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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HARRY KOCKOS and ANDREW KOCKOS, copart-  
ners doing business under the firm name  
and style of Kockos Bros. and KOCKOS  
BROS. (a partnership),

*Plaintiffs in Error,*

vs.

C. ITOH & Co., LTD. (a corporation),

*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

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BROWNSTONE & GOODMAN,

*Attorneys for Defendant in Error.*

FILED

MAR - 1933

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No. 3926

IN THE

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HARRY KOCKOS and ANDREW KOCKOS, copartners doing business under the firm name and style of Kockos Bros. and KOCKOS BROS. (a partnership),

*Plaintiffs in Error,*

vs.

C. ITOH & Co., LTD. (a corporation),

*Defendant in Error.*

---

## BRIEF FOR DEFENDANT IN ERROR.

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Plaintiffs in error have made no attempt to enlighten the court on the facts in this case, for the very good reason that a mere statement of the facts would show that the appeal in this case is utterly without merit.

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## Facts of the Case.

A rather brief statement of the facts in this case together with the references to the instructions given by the trial court, will be sufficient to indicate to this court, that there really is no question of law involved in the case whatever, but that it is purely



one of fact which the jury found and indeed anyone reading the testimony would find, in favor of the defendant in error.

Itoh & Co., Ltd., hereinafter referred to as Itoh, is a corporation engaged in the import business and having an office in Seattle, Washington. On November 29, 1919, Itoh made a contract with Kockos Bros., plaintiffs in error, hereinafter referred to as Kockos, wherein Itoh sold to Kockos one hundred tons of Chinese shelled peanuts, the contract providing that the subject of the contract was: "Chinese Shelled Peanuts, 40 count (Average).'" The contract further provided "Seattle Chamber of Commerce Certificate of Inspection final as to Crop, Count, Quality and Condition." (Page 28, Transcript.)

Before we can understand this controversy, it is necessary to find out what the subject of the contract was, namely, what is meant by the words "Chinese shelled peanuts, 40 count (average)". The meaning of the words "Chinese shelled peanuts" is quite clear, but what is meant by "40 count average" is unintelligible without explanation, and considerable testimony was introduced to show what was meant by this term.

It seems that peanuts are sold to some extent by size, the larger the peanut the more valuable; and the size is determined by the number of peanuts to the ounce; that is, an ounce of peanuts is weighed out, and the number of nuts is counted, and they are usually designated then as 28-30, 30-32, 32-34, 34-36,

and 38-40, meaning in each case, that there are 30 to 32 nuts to the ounce, or 38 to 40 nuts to the ounce, as the case may be. The testimony further showed that the large size nuts, 28-30 and 30-32, are used for salting and in candies, whereas the smaller sizes, such as 36-38 and 38-40 are used for grinding, for peanut butter and other uses, and that there is no difference between the use of a 36-38 nut and a 38-40 nut, except that a 36-38 will usually bring a little better price than a 38-40. In this case the testimony showed that 20 tons of the peanuts were 38-40, and eighty tons were 36-38. To be more accurate, eighty tons averaged, according to the Chamber of Commerce certificate, 37.6 nuts to the ounce, a very small fraction larger than what would be termed 38-40 count. The court will observe, however, that the term used in the contract is 40 count average, and the testimony of all the expert witnesses for plaintiff was that a 40 count average meant anything less than 40 count. The following witnesses testified that the peanuts actually offered for delivery were a good delivery, and came within the meaning of 40 count average, as understood in the trade.

George B. Graham, who made an inspection of the nuts for plaintiff in error, said:

"I considered the count of thirty-seven good delivery on a 40 count contract because they were larger than called for by the contract. Up to that time I never heard of rejection of peanuts because larger than called for. Since then I have heard of such rejection. The 37 count is one peanut per ounce larger than the

38/40. I never heard of objections to larger nuts except when the market was falling."

(Page 64, Transcript.)

Arthur E. Campbell, who was connected with A. U. Pinkham & Company, Importers and Exporters, said:

"The 36/38 peanut was about 25 cents per hundred higher than 38/40's during this period.

I do not believe there is any difference in the utility in the trade between 36/38's and 38/40's. They can be put to practically the same uses.

The difference is between the large sizes 28/30's and 30/32's and the small 36/38's and 38/40's. A premium is paid for the larger nuts."

(Page 72, Transcript.)

Adrian H. De Young, manager of the National Importing & Trading Co. of Seattle, who had purchased these very same nuts from Kockos, said:

"In March 1920, the Chicago office of the N. I. & T. Co. told us to inspect the shipment. Kockos Bros. notified us that Itoh & Co. would give us the inspection order. We turned the order over to the Chamber of Commerce who made the inspection. I remember there were two lots, the smaller lot counted 38/40, and the balance 36/38 to the ounce. The nuts were in good condition, free from foreign matter or bugs of any kind, neither were they rancid nor did they carry an excessive amount of splits. I am familiar with the trade custom throughout the United States with regard to peanuts. When a contract calls for 40 count any peanut that is equal to 40 nuts per ounce or a larger sized peanut which would count less than 40 to the

ounce would be a good delivery under such a contract according to trade custom."

(Page 74, Transcript.)

M. J. Collum, witness for defendant in error, testified:

"I have bought and sold Chinese shelled peanuts extensively in this and other markets. A 38-40 count means an average of 38 to 40 peanuts to the ounce. A 36-38 count means 36 to 38 peanuts to the ounce, etc. There is very little difference between 38-40 and 36-38, this can hardly be detected except by actually counting them. There is practically no perceptible difference to the eye between the two. The only way to determine the difference is by an actual count of the kernels."

(Page 76, Transcript.)

"I would say a 38-40 or a 36-38 count would be a good delivery under a contract calling for a 40 count average. Such is the general understanding of the trade. We prefer the 36-38 because it is a better peanut."

(Page 77, Transcript.)

H. W. Seaman, a witness for defendant in error, testified:

"I have been in the importing business for four years in the Oriental import department of W. R. Grace & Co. I handle many thousand tons of peanuts and am familiar generally with the prices of Chinese shelled peanuts during the year 1920 on the Pacific Coast. \* \* \*

I am familiar with the various counts of peanuts. It is generally accepted and understood



in the trade that a delivery of a lesser count is good under a contract calling for a 40 count."

(Page 79, Transcript.)

Arthur Rude testified for defendant in error as follows:

"I have been in the importing and exporting business for six years, formerly as vice-president and manager of Nuzaki Bros., Incorporated, now for myself. \* \* \*

It is generally understood in the trade that a delivery of 36 to 40 would be a good delivery under a contract calling for 40-count average."

(Page 80, Transcript.)

J. S. Courreges, witness for the plaintiff in error, said on cross-examination:

"A 36-38 peanut is as good as a 38-40 peanut and can in many respects be used for the same purposes. I believe I have sometimes received 36-38 count on a 38-40 contract and have, I believe, sometimes delivered 36-38 count on a 38-40 contract."

(Page 89, Transcript.)

A. Schuman, for the plaintiff in error, gave testimony similar to that of Courreges, on cross-examination:

"I do not recall of any instance of anybody objecting to a delivery of 36-38 peanuts on a 38-40 contract, except the market was falling."

(Page 91, Transcript.)

The defendants introduced no other witnesses to testify to what was meant by 40 count average, and I think that an examination of the testimony in this case on that particular point is conclusive, that



40 count average is satisfied by a delivery of peanuts such as were delivered in this case, of which twenty tons were 38-40, and 80 tons averaged 37.6.

All the witnesses united in saying there was no such thing as a forty count peanut as such, nor would a delivery, any part of which would exceed 40 to the ounce such as 39-41 be a good delivery under such a contract. All the witnesses agreed that a forty count average meant a count less than forty. Andrew Kockos, one of the defendants, claimed that a 38-40 peanut would comply with the contract but a 36-38 would not. (Page 109, Transcript.) His testimony as a whole is entirely unworthy of belief.

Prior to the time that these nuts arrived in Seattle, Kockos resold them to the National Importing and Trading Co., Inc., which had a branch office in the City of Seattle. On March 2, 1920, Itoh wired to Kockos at San Francisco, advising them that the peanuts had arrived that day, and asked for shipping instructions. (Page 33, Transcript.) In reply to this wire and on March 10, 1920, Kockos requested O'Callahan-Graham Co., importers and brokers at Seattle, Washington, to inspect the shipment. George B. Graham of the firm of O'Callahan-Graham Co., made the inspection and on March 10, 1920, sent the following wire to Kockos Bros.:

“Exhibit 29.

March 10, 1920.

Kockos Bros.

46 California St.,

San Francisco, Cal.

Examined to-day two lots China shelled peanuts totaling hundred eight tons per your wire

fifth Itoh shippers Sixteen hundred bags Ex Eastern Victor marked diamond ITC actual count thirty-seven sound clean evenly graded free from mold dirt or works Excellent condition Exceptionally good delivery on forty count Contract lot five hundred sixty sacks Ex Eastern Ocean marked three stars Actual count thirty-nine clean free from works webs or dirt Average two nuts slightly moldy out of six hundred twenty five May not increase but dont like even slight trace Advise if want samples.

Collect

O'Callahan Graham Co."

(Pages 63-64, Transcript.)

In reply to that telegram Kockos sent the following wire to O'Callahan-Graham Co.:

"Exhibit 30."

San Francisco, USA March 12, 1920.

Messrs. O'Callahan-Graham Co.,

Seattle, Wash.

Gentlemen:

We have received your wire of March 10th giving us full information in regard to inspection of 100 tons peanuts to Itoh & Company which information was very clear to us and we thank you for your prompt inspection and answer.

We will communicate with you from time to time to give you some of this business, and in the meantime if you are interested in buying anything, kindly let us hear from you.

We remain,

Yours very truly,

Kockos Bros.,

By Andrew Kockos,

AK:MD.

Import & Export Dept."

(Page 65a, Transcript.)

About the same time, to-wit, about March 12, 1920, the National Importing and Trading Co. at the request of Kockos Bros. had the Chamber of Commerce make an inspection of the peanuts and the inspection certificate of the Chamber of Commerce was delivered to the National Importing and Trading Co.

On March 15, 1920, Itoh again wired Kockos (plaintiff's Exhibit 9, page 36, Transcript), asking for shipping instructions, and advising them that unless shipping instructions were received, the shipment would have to be placed in storage.

On March 17, 1920, and after Kockos Bros. had been advised by O'Callahan Graham Co. of the exact condition of the peanuts (plaintiff's Exhibit 29, page 63, Transcript), Kockos Bros. sent the following wire to Itoh:

"SA San Francisco Cal Mar 17 20  
C. Itoh and Co.  
Central Bldg Seattle

Ship hundred tons peanuts Kockos brothers  
Chicago Notify Natl Importing Trading Co  
Phone them They probably will change ship-  
ping instructions This satisfactory to us Ad-  
vise.

Kockos Bros."

(Plaintiff's Exhibit 11, page 37, Transcript.)

After the receipt of this wire, just set forth, Kockos conferred with the National Importing & Trading Co. and received shipping instructions which were confirmed by a letter (plaintiff's Exhibit 12, page 38, Transcript), in which, among other

things, the National Importing & Trading Co., by A. H. De Young, vice-president, said,

“We further wish to confirm the writer’s conversation with you today, in which we instructed you to ship one hundred (100) tons Chinese Shelled Peanuts, on which we have Chamber of Commerce certificates. You are to ship, notify National Importing & Trading Co., 30 No. Dearborn St., Chicago, Illinois, cars to go to Sibley Warehouse, Clarke Street Bridge.”

The record in this case shows that the Chamber of Commerce certificates were procured by the National Importing & Trading Co. on March 15, 1920, so that at the time the order was given to Itoh to ship these peanuts, both Kockos and the National Importing & Trading Co. knew their exact condition.

The record shows without contradiction that about March 15, 1920, the peanut market started to break, and after that time there was a rapid decline in the price of the same. These peanuts reached Chicago in due course, but evidently the National Importing & Trading Co. were in financial difficulties, because in May they were taken over by a committee of creditors, and subsequently they were adjudged bankrupt (page 75, Transcript), and therefore refused to accept the peanuts.

After the peanuts were shipped, Itoh drew a draft against Kockos for the purchase price thereof, and the same was sent to San Francisco for payment.

These documents arrived in San Francisco about March 30th, whereupon Kockos wired Itoh, saying the peanuts were not the exact count which they



bought, and they desired a reduction in price. On April 1, 1920 (page 49, Transcript), Itoh wired Kockos, refusing to give any price reduction, and stating that they understood that the present difficulty had nothing to do with the grade of the nuts in question. On April 6, 1920 (page 49, Transcript), five days later, Kockos again wired Itoh refusing to accept. On April 9, 1920, Itoh, wired Kockos as follows:

“Seattle, Wash., April 9, 1920.

Messrs. Kockos Bros.,  
40 California St.,  
San Francisco, Cal.

Your wire sixth referring your purchase sixteen hundred bags peanuts inasmuch as you were aware some six or eight days before giving us instructions that peanuts were of a higher count than thirty eight forty we feel that the matter of price should be submitted to arbitration you to name one arbitrator we one and the two one making arbitration board of three. Will you name your arbitrator.

C. Itoh & Co. Ltd.”

(Page 50, Transcript.)

Again on April 13th Itoh wired Kockos as follows:

“F Seattle was 535 P 13.

Kockos Bros.,

40 California St., San Francisco, Calif.

Our position is that contract November twenty-eight, nineteen nineteen, for one hundred tons Chinese peanuts have been fully performed by us, and in addition that both yourselves and your buyer National Importing Trading Company had inspected and passed peanuts previous to giving us shipping instruc-



tions Stop Our telegraphic offer April ninth of arbitration has been ignored by you Stop Therefore unless you promptly honor drafts we will have no alternative except to dispose of the peanuts for your account and bring action against you for all loss sustained. Must have reply within forty eight hours.

C Itoh and Co Ltd."

(Page 51, Transcript.)

On April 15th, Kockos replied to Itoh as follows:

"19 SF 74 NL

San Francisco, Calif., 714

Messrs. C. Itoh & Co.,

Seattle, Wash.

Your wire thirteenth received. As per previous communications we have been able ready and willing to confirm our contract and accept documents according to terms of contract but you have absolutely failed to comply as your certificate self explains Stop We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once

Kockos Bros."

(Page 51, Transcript.)

Thereafter the peanuts arrived in Chicago, and were sold.

There are only two questions involved in this case. The first is, Did the peanuts offered for delivery come within the definition of a 40 count average? If they did, that is an end of this case. The proof was conclusive, that the peanuts offered for delivery were such as were described in the contract.

The second point involved is whether or not there has been a waiver, conceding for the sake of argu-

ment, that a portion of the nuts were not forty count average, on the part of Kockos in accepting these peanuts, and ordering them shipped, after both they and their purchaser had full knowledge of their actual count.

Both of these questions are purely questions of fact, and they were determined by the jury adversely to plaintiff in error. The court, in charging the jury, said,

“The defendant admits the execution of this contract; and it also admits that it declined to accept the peanuts which the plaintiff tendered to it; the defense being that the nuts were not the 40 count average size, that being the only defense. In such case the burden is upon the plaintiff to show, by a preponderance of the evidence, that it tendered substantially what the contract calls for, or, if it did not tender precisely what the contract calls for, that the defendant waived its right to reject the offer, and in fact accepted the tendered article in fulfillment of the contract.

Generally speaking, I have to say to you that a party to a contract cannot, and the plaintiff here could not, tender something other than the precise thing called for by the contract. claimed to be as good, or better, and demand the acceptance thereof. It must tender what it contracted to deliver unless, as already suggested, the defendant, with full knowledge of the facts, waives the objection and accepts the substituted article as a fulfillment of the obligation of the other party to the contract. As you have heard here, the contract calls for a 40 count average. Some testimony was admitted as to the custom of the import trade in peanuts, the wholesale trade, of the meaning of this phrase as the same is understood by men engaged in

the trade. This testimony, gentlemen, was not offered or received for the purpose of changing the contract, or justifying you or me in changing or altering the contract, or relieving either party from the obligation thereof, but merely to assist us in determining what the contract is, and whether the peanuts tendered by the plaintiff were within the terms thereof as the same was understood and entered into by the parties. In other words, this testimony was received for the purpose of throwing light upon the meaning of this phrase, not of changing it or modifying it in any way, but of finding out what its meaning was, for the purpose of finding out what the parties really agreed upon and what their contract and obligations were.

It is conceded by the defendant that, as such a contract, or such a phrase, is understood in the trade, it is not necessary that the nuts average precisely 40 to the ounce, but that 38-40 as they are called, would be regarded as meeting the requirement, or the demand, of such phrase. And the defendants further contend that any larger nut than 38's would be beyond the meaning of this phrase, or be without its meaning, and, hence, would not meet the requirements. The plaintiff, on the other hand, contends to the contrary, and has introduced witnesses whose testimony tends to show that the count 40 average is understood in the trade to be only a limit to the smallness of the nuts; and that under such a contract it is the common understanding and custom that a slightly larger nut is deliverable; and that not only 38-40's but that 36-38's are deliverable, and are customarily delivered and accepted under such a contract as being in fulfillment thereof. There is that difference, you will see, one party contending that 38-40's fulfilled the contract, and the other party, the plaintiff, contending that not only

38-40's would fulfill it, as is the common understanding, but that even a slightly larger nut, a 36-38, would be regarded as complying with the terms. It is for you to say upon which side of this particular issue the truth lies. If, from the evidence, you believe that, under trade customs and practice, the parties, when they entered into this contract, intended and understood that it called for a 40-count average, and that it was merely a limit upon the smallness, that it couldn't be smaller than 40, and that it would be satisfied by 38-40's, and also 36-38's, a slightly larger nut, then you will find for the plaintiff, for, in that contingency, it is submitted that the plaintiff tendered such a nut as was called for by the contract, that is, upon the assumption that it means 36-38's as well as 38-40's."

(Pages 113-115, Transcript.)

We have already called the court's attention to the fact that when Kockos ordered these nuts shipped to Chicago, and told Itoh to accept the directions and instructions of the National Importing & Trading Co. Kockos knew the exact count of the nuts, as did also the National Importing & Trading Co., who had theretofore received the Chamber of Commerce certificates. On this branch of the case the court charged the jury as follows:

"If, upon the other hand, you find that the 36-38's did not meet the clause of the contract as it was understood by both parties when it was entered into, and by the custom and practice of the trade, to which I have adverted, then you will consider plaintiff's contention of a waiver and acceptance by the defendant, for one party to the contract, that is, the purchaser



under a contract, who has the right to demand goods of a certain class or quality, may waive some defect or objection upon that ground and accept the goods of a somewhat different type or quality, in fulfillment of the contract. You have heard the testimony upon this point, and the discussion of counsel, tending to illuminate it; and you will say whether or not, with knowledge of the facts, the defendant did in fact waive such objection, if any there might be upon this ground, and did in fact accept the tendered nuts as being in full compliance with the obligations of the plaintiff to deliver under the contract. If you find that such an acceptance was in fact and intelligently made, then the defendant would be bound just the same as if such nuts were originally agreed upon. If, upon the other hand, you find that there was no waiver and acceptance, and you find that the nuts were not in accordance with the clause of the contract as understood by the parties, then your verdict should be for the defendant, absolutely; but if you find for the plaintiff, under the instructions I have given you, the next question is as to the amount of its damages.”

(Pages 115 and 116, Transcript.)

It seems to me that no citations of authorities are necessary to establish the elementary principles of law involved in this case. Obviously no testimony was introduced to change or vary the meaning of this contract. Testimony was simply introduced to explain the meaning of a phrase which would otherwise be unintelligible. The question of waiver is also elementary. Any person can waive anything for his benefit, and such waiver is always a question of fact.



I shall, however, cite to the court some authorities to sustain the instructions of the court, though it seems to me entirely unnecessary.

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**PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN A TRADE TERM  
IN A CONTRACT.**

Neither the court, jury or counsel would have known what was intended or meant by the words "40 count average" and therefore it would have been impossible to determine whether or not peanuts in conformity with the contract had been tendered, unless some explanation was made to the court and jury in order to enable them to understand this term. That the law permits such explanation is too plain to admit of argument.

We have examined the matter at some length, and find that there are a tremendous number of authorities on this point, and we therefore think it advisable to cite a few.

The general subject is reviewed in 22 Corpus Juris 262, and in 9 Ency. of Evidence 387.

Judge Bean while a member of the Supreme Court of Oregon and in the case of Barnes v. Leidigh, 79 Pac. 52, says:

"It is competent, therefore, from their standpoint, to show the meaning of the terms 'merchantable lumber, mill run', as used in the vicinity where the contract was made. These words are not in common use, and have no settled judicial meaning. They are peculiar to the lumber trade or business, and, as the evi-

dence tended to show, have a special meaning, and are well understood by persons engaged in such business. The testimony was therefore important and necessary, in order to enable the court to construe the contract, and the jury to render a proper verdict. 2 Wharton, Ev. (2d Ed.), sec 962; Corneil v. Lumber Co., 71 Mich. 350, 39 N. W. 7; Jones v. Anderson (Ala.), 2 South. 911."

"The defendant Ohsman should have been permitted to testify as to the trade terms used in the old-iron business, and as to what 'mixed cast and forged iron' meant among dealers."

Grasmier v. Wolf, 90 N. W. 814.

"We think that was error. It was the duty of the Court to construe the contract in such a way as to render it operative and effectual to carry out the purpose of the parties, as expressed in the language and terms which they used. As a general rule, the words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; but if they are used in a technical sense, they should be interpreted as usually understood by persons in the profession or business to which they relate; or if they have a special meaning given to them by usage, the meaning should be followed. (Sections 1644, 1645, Civ. Code.) In such a case, evidence explanatory of the words is admissible, not for the purpose of adding to or qualifying or contradicting the contract, but for the purpose of ascertaining it by expounding the language, and so enabling the Court to interpret it according to the actual intention of the parties, and the law, and usage of the place where it is to be performed. (Sections 1636, 1646, Civ. Code.)

Callahan v. Stanley, 57 Cal. 479.

“The parol evidence was properly admitted to explain the signification attached, among persons engaged in the timber business, to the words ‘hewn timber, to average one hundred and twenty feet, and to class B No. 1 good’.”

Jones v. Anderson, 76 Ala. 428; 2 Southern 912.

“If the terms are only used in a peculiar trade, or service or calling, the meaning must be gathered from the testimony of persons acquainted with the trade, or service, or calling in which the terms are employed, and it is for the jury to ascertain the meaning of the term used.”

Long v. Davidson, 101 N. C. 170; 7 South-eastern 758.

See, also, Fuller v. Metropolitan Life Ins., 37 Fed. 163; Buckbee v. Hohenadel, 224 Fed. 14-24.

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#### WAIVER.

As before pointed out the jury were instructed that the defendants in error claimed that there was a waiver by the defendant of any objection to the character of the merchandise.

The contract in this case provided that the merchandise was to be delivered at Seattle, Wash., f. o. b. cars. (Page 28, Transcript.) Immediately upon their receipt in Seattle, Kockos was notified and thereupon procured inspection to be made by O’Callahan-Graham Co. and the latter on March 10, 1920, advised Kockos as follows. (Exhibit 29, page 63, Transcript.)

“March 10, 1920.

Kockos Bros.

46 California St.,

San Francisco, Cal.

Examined today two lots China shelled peanuts totaling hundred eight tons per your wire fifth Itoh shippers Sixteen hundred bags Ex Eastern Victor marked diamond ITC actual count thirty seven sound clean evenly graded free from mold dirt or works Excellent condition Exceptionally good delivery on forty count Contract lot five hundred sixty sacks Ex Eastern Ocean marked three stars Actual count thirty nine clean free from worms webs or dirt Average two nuts slightly moldy out of six hundred twenty five May not increase but dont like even slight trace Advise if want Samples.

O'Callahan-Graham Co.”

In answer to that Kockos wired:

“We have received your wire of March 10th giving us full information in regard to inspection of 100 tons peanuts to Itoh & Co. which information was very clear to us and we thank you for your prompt inspection and answer.”

The Chamber of Commerce certificate which confirms the report of O'Callahan-Graham & Co. was issued on March 15, 1920, at the request of the National Importing & Trading Co. to whom Kockos had sold these peanuts and after the certificate had been delivered to the National Importing & Trading Co. and on March 17, 1920, Kockos wired Itoh

“ship 100 tons of peanuts to Kockos Bros. Chicago, notify National Importing Trading Co. Phone them. They probably will change



shipping instructions. This satisfactory to us. Advise."

(Exhibit No. 11, page 37, Transcript.)

They had full knowledge therefore of the count of the peanuts and after they knew that the Chamber of Commerce certificate had been prepared and delivered to the persons to whom they sold, they accepted delivery of this merchandise by ordering it shipped from the place where it was to be delivered to them, namely, at Seattle, to Chicago, and it was not until they found out that the National Importing & Trading Co. would not take the merchandise that they tried to run out on their contract. According to their own contention, the merchandise offered for delivery could be used for the same purpose as the merchandise which they contended they were to receive, was of a better quality, and was worth more in the market. They therefore could not possibly have been prejudiced in any way by their acceptance of this merchandise.

Under such circumstances, the jury were instructed to determine whether they had in fact waived any objection on their part, that the count of the peanuts was not what they had ordered. At the time plaintiffs in error ordered this merchandise shipped they had full knowledge of the contract, full knowledge of any right which they possessed, if they did possess any, to refuse to accept delivery thereof. They were not acting under a mistake of fact or of law and had full knowledge of all the conditions surrounding this purchase.



In the case of *California S. H. Co. v. Calendar*, 94 Cal. 126, the court said:

“In *Fishback v. Van Dusen*, 33 Min. 111, Mr. Justice Mitchell, speaking for the court, said: ‘Whether there has been a waiver is a question of fact. It may be proved by various species of evidence,—by declarations, by acts, or by forbearance to act.’ Other authorities say it is a mixed question of law and fact, but that each case must depend upon its own peculiar circumstances and surroundings. ‘It is a question of intention, and a fact to be determined by the triers of fact.’ (*Okey v. State Ins. Co.*, 29 Mo. App. 111; *Ehrlich v. Insurance Co.*, 88 Mo. 249; *Drake v. Insurance Co.*, 3 Grant Cas. 325; *Witherell v. Insurance Co.*, 49 Me. 200); ‘and though the waiver must be intentional and clearly proven, the sufficiency of the evidence relating thereto is for the jury.’” (*Insurance Co. v. Schollenberger*, 44 Pa. St. 259.)

At 40 Cyc., 267, we find the following language supported by copious authorities:

“Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances, or by a course of acts and conduct which amounts to an estoppel.”

The testimony of waiver in this case is so clear as to amount to legal proof of a waiver. However

the matter was submitted to the jury under appropriate instructions of the court, and it was for them to determine whether the plaintiffs in error had any right to waive and if having such right, they waived it.

We shall also briefly call attention to the points and authorities which have been advanced by plaintiffs in error and shall answer them in the order in which they are presented.

**A. There is no dispute about the facts contained in the Chamber of Commerce certificate.**

Plaintiffs in error suggest that the Chamber of Commerce certificate is final as to count and is binding upon both parties. We do not dispute this.

Our contention is, first, that the count of the peanuts was in conformity with the contract, and therefore the nuts should have been accepted by plaintiffs in error, in fact, we believe that is clearly shown by the testimony and there is no doubt that the jury so found.

If there be any doubt about that, the plaintiffs in error by accepting the peanuts waived any objection to the count. We are not disputing the facts set forth in the Chamber of Commerce certificate.

**B. Plaintiffs in error are not entitled to a nonsuit as to the 1600 bags.**

In presenting their claim that the motion for a nonsuit as to the 1600 bags should be granted, plaintiffs in error assume that the 40 count average

means that the peanuts must be 38-40, and that the count of 37.6 did not come within the terms of the contract. The testimony, however, shows that the tender of the count of 37.6 was clearly within the terms of the contract. As before pointed out there was also a waiver which plaintiffs in error do not take into account.

**C. Motion for a nonsuit as to the 400 bags was properly denied.**

Plaintiffs in error say that the evidence without contradiction shows that 400 bags were 40 count. He means that they were 38-40 count. (See Chamber of Commerce certificate, page 41, Transcript.)

The fact is that there was never any sufficient tender or offer on the part of the defendant to pay for the 400 bags. The peanuts arrived in Seattle on March 2, 1920. On that very day Kockos was advised of their arrival. On the 15th of March, Kockos gave shipping instructions to Itoh, and in compliance therewith the peanuts were shipped to Chicago. On March 30th, drafts were presented in San Francisco to Kockos, for the cost of the peanuts, and on that day, to-wit, March 30th, Kockos wired Itoh asking for a reduction in price. (Page 4, Transcript.) This was immediately refused by Itoh. On April 6th Kockos repudiated the contract and refused to accept delivery. (Page 49, Transcript.) Itoh was entitled to immediately sue for the breach.

Now it seems that plaintiffs in error contend that the breach was waived as to the 400 bags or twenty

tons, and their sole testimony on this point is a telegram sent by Kockos to Itoh on April 15th in reply to a telegram sent by Itoh in which Itoh told Kockos that they intended to sell these peanuts for the account of Kockos. This wire of April 15th is as follows (Exhibit 25, page 51, Transcript.):

"San Francisco, Calif.

Messrs. C. Itoh & Co.,  
Seattle, Wash.

Your wire thirteenth received. As per previous communication we have been able ready and willing to confirm our contract and accept documents according to terms of contract but you have absolutely failed to comply as your certificate self explains Stop We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once.

Kockos Bros."

It is not an offer to say that

"we understand from the documents you have presented us there was a portion 40's and if there is present documents immediately and if they are in order we will take up draft at once."

This is not an unconditional offer or tender nor can we understand what is meant by the words "portion of 40's". There were 400 bags of 38-40 and 1600 bags of 36-38, the latter averaging 37.6.

According to the testimony in this case, and to the understanding of defendant in error, it made no difference whether the peanuts were 38-40 or 36-38. They would still be 40 count average. So that the telegram itself had no meaning.



However conceding for the purpose of argument that the plaintiffs in error did actually offer to accept and pay for 20 tons, they would not have been entitled to have a nonsuit granted as to 20 tons. This contract was an entire contract and not a separable or divisible one. If we made a contract to deliver 100 tons of peanuts we were bound to deliver the whole 100 tons; we could not offer 20 tons or complete the contract partially and leave the purchaser to sue for the breach of the balance of the contract; nor could the purchaser where he had purchased 100 tons of peanuts offer to accept 20 tons of the same, and make the seller sue him for breach of contract for refusal to accept the balance. If this were a contract for instance that provided for the delivery of 100 tons of peanuts; 50 tons sugar; and 10 tons of coffee, it might be separable and divisible as to the peanuts, sugar or coffee; that is, either seller or buyer might deliver or accept delivery, of the sugar, or the peanuts, or the coffee, and partially fulfill the contract to the extent of the delivery of the separate items, but that is only so in a separable or divisible contract.

In the leading case of *Norris v. Harris*, 15 Cal. 226-256, Justice Stephen J. Field, said:

“As we have already stated, three of the slaves designated in the instrument of transfer to Norris had been at the time sold, and it appears from the evidence that a deficiency existed in the number of horses and cattle, and hence, it is contended that the plaintiff was under no obligation to accept those which remained, on the ground that the contract was



entire for the whole of the personal property. It is undoubtedly true that an entire contract is indivisible—that the whole must stand or fall together. But a contract, made at the same time, of different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale had such failure been anticipated. In the present case, the contract includes three items—the slaves, the horses and the cattle. As to the slaves the contract is clearly entire. The gross sum is fixed for the whole number, and no means of determining the price for each one is afforded, and hence the agreement is implied that the whole are to be taken or none. (Story on Contracts, sec. 23; *Miner v. Bradley*, 22 Pick. 459.)”

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**THE TRIAL COURT DID NOT ADMIT ANY TESTIMONY TO VARY  
THE TERMS OF THE CONTRACT.**

Counsel makes the point that evidence was admitted to vary the terms of the written contract. As before pointed out no such testimony was admitted. The testimony adduced was in explanation of a trade term in the contract.

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**WAIVER.**

We have already discussed the question of waiver. The only criticism that plaintiffs in error make on

this point is that the testimony does not support it. Whether there was a waiver or not was a matter to be submitted to the jury and it was under the instructions of the court so submitted. There is no doubt that this case was decided by the jury squarely upon the proposition that the nuts delivered were such as were contemplated by the contract. It is quite clear that plaintiffs in error believed that position was correct as did the Nat. Imp. & Trading Co. It was only after plaintiffs' in error found out that the National Importing & Trading Co. were going to be unable to fulfill their contract, that they tried to run out on their contract, undoubtedly figuring that if they did accept the peanuts they would have to sell at a loss, and they could be no worse off if they refused to accept them and took their chances on a law suit. If Kockos had accepted these peanuts, he would have had to sell them as did the defendants in error and would have sustained the same loss, namely, the sum of \$8500.00. As it was, he saved interest on the amount from the time the sale was made by the defendant in error until the date judgment was rendered which was for a period of over a year, and also took his chances on saving something by the cleverness of his attorneys.

During the trial of this case an amusing incident occurred which serves to show the utter lack of merit in the position of plaintiffs in error. Defendant in error had identified and introduced in evidence a sample of a 36-38 peanut and one of a

38-40 peanut. Plaintiff in error produced two expert witnesses, one, Mr. A. Schuman, who said he might be able to distinguish between a 36-38 and a 38-40 peanut if he had them side by side. The two samples were produced and the following proceedings occurred:

"The witness was then shown by Mr. Brownstone the two boxes of peanuts, heretofore offered in evidence, the 36/38 count being marked No. 1, and the 38/40 count being marked No. 2, and was asked to examine the two samples, and then to tell which box was 36/38 and which was 38/40.

Mr. BROWNSTONE. Q. Supposing you look at these two boxes of peanuts and tell us whether you can tell one is 38/40 and the other is 36/38 or are they the same? What would be your judgment on it?

A. Offhand I would say that these here (indicating 36/38 box) were the 38/40.

Mr. BROWNSTONE. Well, your guess was wrong. I just want to call the jury's attention to the fact that this is the 36/38."

(Page 91, Trans.)

There was no defense to this action legally or morally and the judgment should be affirmed.

Dated, San Francisco,

March 3, 1923.

BROWNSTONE & GOODMAN,

*Attorneys for Defendant in Error.*



No. 3926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

7

HARRY KOCKOS and ANDREW KOCKOS, copart-  
ners doing business under the firm name  
and style of Kockos Bros. and Kockos  
BROS. (a partnership),

*Plaintiffs in Error,*

VS.

C. ITOH & Co., LTD. (a corporation),

*Defendant in Error.*

PETITION FOR A REHEARING ON BEHALF OF  
PLAINTIFFS IN ERROR.

RAYMOND PERRY,

FORD & JOHNSON,

Mills Building, San Francisco,

*Attorneys for Plaintiffs in Error  
and Petitioners.*

FILED

NO

F. D. MURPHY





No. 3926

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

HARRY KOCKOS and ANDREW KOCKOS, copartners doing business under the firm name and style of Kockos Bros. and KOCKOS BROS. (a partnership),

*Plaintiffs in Error,*

vs.

C. ITOH & Co., LTD. (a corporation),

*Defendant in Error.*

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## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

Application and petition of plaintiffs in error for rehearing in the above entitled action and matter respectfully shows:

That judgment was pronounced in said cause by the United States Circuit Court of Appeals for the Ninth Circuit on the 2nd day of April, 1923,

affirming the judgment of the District Court of the United States in favor of the defendant in error and against the plaintiffs in error.

Plaintiffs in error now petition that their application to have a rehearing by this Honorable Circuit Court upon the ground that the judgment pronounced by said court is erroneous in this:

First: That the decision of the United States Circuit Court for the Ninth Circuit is based upon the decision of *Robinson v. United States*, 13 Wall. 363, which decision was affirmed by *Hostetter v. Park*, 137 U. S. 30; *Brown v. Rushville Furniture Co.*, 285 Fed. 376.

The facts of the case of *Robinson v. United States*, do not support the application of that decision to the case at bar.

In the case of *Robinson v. United States*, the contract provided for one million bushels of first quality clear barley to be delivered between the first of July, 1867 and the 30th day of June 1868, in such quantities and at such time as might be required for the use of the government troops, and at certain posts named.

*“But there was no specification in the instrument, of any particular manner in which the barley was to be delivered, as whether loose, or in what is known as ‘bulk’, or in sacks.*

Under this contract, Robinson & Co. delivered in sacks all the barley required, between July 1, 1867 and January 1st, 1868; how much, exactly, did not appear, but it was more than 30,000 pounds. On the 10th of January, 1868, being required to deliver 30,000 pounds more,

they tendered the quantity in bulk—that is to say, loose in wagons. The officer at the post where it was tendered, refused to receive it, because it was not in sacks. Thereupon, the contractor refused to deliver any more, and abandoned his contract altogether.”

At page 363 the Supreme Court stated:

“It is obvious by the steps which the plaintiffs took to perform their contract, that there are two modes in which barley may be delivered, for they delivered part in sacks and tendered part in bulk. And it is equally obvious, on account of the additional cost, that they would not have delivered the barley in sacks for a period of six months, if the contract, on its face, was satisfied by delivery in bulk. *The contract, by its terms, is silent as to the mode of delivery, and although there are two modes in which this can be done, yet they are essentially different, and one or the other and not both must have been in the mind of the parties at the time the agreement was entered into.* In the absence of an express direction on the subject extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties; and what extrinsic evidence is better to ascertain this than that of usage?”

The Robinson case, therefore, did not specify the method of delivery. The contract being silent, it was proper to resort to the usages prevailing to interpret the contract.

In the case at bar the contract was not silent upon the subject. It provided:

“Remarks: Seattle Chamber of Commerce Certificate final as to crop, count and condition.”

By inserting that provision, the parties intentionally and purposely agreed that a third person should pass upon and determine whether the tender was within and in conformity with the terms of the contract. So that when the tender was made by the defendants in error, the Seattle Chamber of Commerce was requested to pass upon the shipment, and the Seattle Chamber of Commerce did so and determined that 1600 bags were of the count of 36/38. This determination was final and binding upon both of the parties.

The law is always a part and a portion of a contract, and by inserting the provision that the Seattle Chamber of Commerce Certificate must be final as to crop, count and condition, the following rule declared in *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274, at page 279, was inserted into the contract:

“Nothing is better settled than the rule that where the parties agree that the performance or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding in the absence of fraud or mistake.”

We, therefore, respectfully submit that the case at bar is not silent upon any subject upon which usage may be introduced for the purpose of completing the contract, and that the decision relied upon by this Honorable Court is based on a contract that was silent as to the mode of delivery, therefore the



authorities cited do not support the application of that doctrine in this case.

The question that the larger nuts are more valuable cannot be considered in this matter, as the Supreme Court of the United States stated in *Norrington v. Wright*, 115 U. S. 188-209, in quoting Lord Blackburn:

“If the description of this article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. But the parties have chosen for the reasons best known to themselves to say: We bargained to take rice shipped in this particular region at that particular time on board that particular ship, and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it.”

We, therefore, respectfully request that this Honorable Court do reconsider its decision in this case, and in doing so that it place it in the position of the parties at the outset of their business relation. That they do offer and accept the Seattle Chamber of Commerce as the final inspector, and that they do so for the purpose of avoiding disputes between them and agree to stand by the decision of the inspector.

This being the fact the contract is not one which is silent upon any subject upon which usage or custom may be introduced to explain or vary, and

that therefore the trial court erred in permitting the introduction of the testimony of usage and custom.

Second: Plaintiffs in error further respectfully call the court's attention that this Honorable Court in its decision did not pass upon the question of plaintiffs' in error liability for the 400 bags which they offered to accept and pay for, and in support of this we wish to quote a statement of the trial court on the motion for non-suit:

"I will say to you, Mr. Brownstone, my impression is rather against you on that, but I will hear you a little further. I have difficulty in seeing why you should be unwilling to deliver the 400 bags if the offer to make them was unconditional."

Wherefore, plaintiffs in error pray that their application for a rehearing be granted.

Dated, San Francisco,

May 1, 1923.

RAYMOND PERRY,

FORD & JOHNSON,

*Attorneys for Plaintiffs in Error  
and Petitioners.*

## CERTIFICATE OF COUNSEL.

We hereby certify that we are of counsel for plaintiffs in error and petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,

May 1, 1923.

RAYMOND PERRY,

GEO. K. FORD,

*Attorneys for Plaintiffs in Error  
and Petitioners.*



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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BURRELL JOHNSON,  
Plaintiff in Error,  
vs.  
THE UNITED STATES OF AMERICA,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District  
Court of the Western District of Wash-  
ington, Northern Division.

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FILED  
JAN 13 1973  
F.D. MONKTON





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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BURRELL JOHNSON,  
Plaintiff in Error,  
vs.  
THE UNITED STATES OF AMERICA,  
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Court of the Western District of Wash-  
ington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Counsel.**

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310 Federal Building, Seattle, Washington.

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United States District Court, Western District of Washington, Northern Division.

No. 6630.

November, 1921, Term.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Indictment.**

SS. Violation of Act of Oct. 17, 1919 (National Motor Vehicle Theft Act).

United States of America,  
Western District of Washington,  
Northern Division.

The grand jurors of the United States of Amer-

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\*Page-number appearing at foot of page of original certified Transcript of Record.

ica, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That Burrell Johnson, on or about the fifteenth day of February, in the year of our Lord one thousand nine hundred and twenty-two, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court then and there being, did then and there knowingly, wilfully, unlawfully and feloniously, transport, and cause to be transported, in interstate commerce, from the City of Boston, in the State of Massachusetts, to the City of Seattle, in the State of Washington, in the Northern Division of the Western District of Washington, a certain motor vehicle, to wit, a [2] certain "Nash" automobile bearing serial number 191476, motor number 82424, body number 2069, Generator number 1228857, starter number 1228762, battery number 5641126, a more particular description of said automobile being to the grand jurors unknown, the said Burrell Johnson then and there well knowing that the said motor vehicle had been theretofore stolen from the true and lawful owner thereof; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,

United States Attorney.

JUDSON F. FALKNOR,

Assistant United States Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of the Grand Jury, and Filed in the U. S. District Court March 21, 1922. F. M. Harshberger, Clerk. [3]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
BURRELL JOHNSON,  
Defendant.

**Arraignment.**

Now on this 27th day of March, 1922, the above defendant comes into open court for arraignment accompanied by his attorney R. J. Meakim and says that his true name is Burrell Johnson. Whereupon he is allowed one week in which to plead.

Journal #10, page 85. [4]

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United States District Court, Western District of  
Washington, Northern Division.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
BURRELL JOHNSON,  
Defendant.



**Plea.**

Now on this 3d day of April, 1922, the above defendant comes into open court accompanied by his attorney, R. J. Meakim, and here and now enters his plea of not guilty.

Journal #10, page 95. [5]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Trial.**

Now on this 5th day of June, 1922, this cause comes on for trial with defendant Johnson present accompanied by his attorney R. J. Meakim and J. F. Falknor present for the Government. Whereupon all parties being present a jury is empanelled and sworn as follows: F. C. Doolittle, Charles F. Schell, Joseph H. Sargent, Louis Rubenstein, Earl W. Raymond, Harry B. Sawyer, J. O. Edwards, H. R. Gale, L. H. Love, Charles C. Querin, Leslie L. Peters, and W. A. Crittenden. Opening statement is made to the jury for the government by J. F. Falknor. Government witnesses are sworn

and examined as follows: H. H. Crabtree, L. S. Reed, W. E. Worsham and J. P. Smith. Government Exhibits Numbers 1, 2, 3 and 4 are introduced as evidence. Government rests. Defendant moves for a suppression of evidence and to strike the testimony of Government's witnesses. Said motion is denied and exception allowed. Defendant's witnesses are sworn and examined as follows: Burrell Johnson, E. J. Romono, Wm. L. Meyers, Dorothy Johnson, Silas D. Johnson and W. E. Worsham (recalled). Defendant's Exhibits "A" and "B" are introduced as evidence. Defendant rests. Government's witness in rebuttal is Edna Holmes. Government rests.

Journal #10, page 204. [6]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Trial (Resumed).**

Now on this 6th day of June, 1922, the above-entitled defendant is present in court and attorneys for both sides being present, and all jurors present, trial of this cause is resumed. Defendant's witness

Burrell Johnson is recalled. Defendant's Exhibit "C" is introduced as evidence. Whereupon motion is made by the defendant for a directed verdict of not guilty on the ground of the insufficiency of the Government's evidence. Said motion is denied and exception allowed. This cause is now argued to the jury by both sides and jury after being instructed by the Court, retires for deliberation. Jury again comes into open court at 2:30 P. M. and all parties are present, likewise all jurors, a verdict of guilty is returned and read as follows: "We, the jury in the above-entitled cause, find the defendant Burrell Johnson is guilty as charged in the indictment herein, Louis Rubenstein, foreman." Verdict is ordered filed and jury discharged from further consideration of the case. Defendant moves for arrest of judgment and for a new trial. Sentence and disposition of above motions are continued to June 12, 1922, and defendant is allowed to go on present bail.

Journal #10, page 205. [7]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find the defendant Burrell Johnson is guilty, as charged in the indictment herein.

LOUIS RUBENSTEIN,  
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jun. 6, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Motion for New Trial.**

Comes now Burrell Johnson, defendant herein, by his attorney, R. J. Meakim and moves the Court for an order setting aside the verdict of the jury heretofore rendered herein and granting the defendant a new trial for the reasons and upon the grounds:

1. That the verdict is contrary to the law of the case.

2. That the verdict is not supported by any evidence in the case.

3. Surprise that ordinary prudence could not have guarded against.

4. The Court, upon the trial of the case admitted incompetent evidence offered by the United States and refused to admit competent evidence offered by the defendant.

5. The Court erred in refusing to direct a verdict of Not Guilty at the close of the Government's case.

5. The Court erred in refusing to direct a verdict of Not Guilty at the close of all the evidence.

R. J. MEAKIM,

Attorney for Defendant.

Received a copy of the within Motion this 12th day of June, 1922.

THOS. P. REVELLE,

Attorney for Plaintiff.

By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 12, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [9]



United States District Court, Western District of  
Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Hearing on Motion for New Trial.**

Now on this 16th day of June, 1922, this cause comes on for hearing on motion for new trial with R. J. Meakim present for defendant and J. F. Falknor for Government. Said motion is argued and denied with exception allowed. Government moves for judgment and sentence. Said motion is granted at this time and sentence is passed.

Journal No. 10, page 221. [10]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Sentence.**

Now on this 15th day of June, 1922, the said defendant Burrell Johnson comes into open court for sentence and being informed by the Court of the charges herein against him, and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises it is considered ordered and adjudged by the Court that the defendant is guilty of violating the Act of October 17, 1919, National Vehicle Theft Act, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the term of two years at hard labor. And the said defendant is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree No. 3, page 290. [11]

United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Petition for Writ of Error.**

In the Above-entitled Court and to the Honorable  
FRANK H. RUDKIN, Judge Thereof:

Comes now the above-named defendant, Burrell Johnson, by his attorney and counsel, respectfully shows that on the 6th day of June, 1922, a jury in the above-entitled court and caused returned a verdict finding the defendant above named guilty of the charge in count one of the indictment contained in his indictment which was heretofore filed in the above-entitled court and cause and thereafter, and within the time limited by law, under rules and order of this court, said defendant moved for a new trial, said motion was by the court overruled and exception thereto allowed; and likewise within said time filed his motion for arrest of judgment, and which was by the Court overruled and to which an exception was allowed; and thereafter, on the 16th day of June, 1922, said defendant was, by order and judgment and sentence of the above-entitled Court,

in said cause, sentenced to serve a term of two years in the United States penitentiary at McNeils Island, Washington.

And your petitioner, feeling himself aggrieved by this verdict and the judgment and sentence of the Court, entered herein as aforesaid, and by the orders and ruling of this Court, and proceedings in said cause, now herewith petitions this [12] Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the proceedings of said Court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the assignment of errors presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by the Circuit Court of Appeals corrected, and for that purpose a writ of error thereon should issue as by the law and the rulings of the Court provided, and wherefor premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned and presented herewith, and that pending the final termination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed and that

pending such final determination, said defendant be admitted to bail.

R. J. MEAKIM,  
Attorney for Petitioner, Burrell Johnson, Plaintiff  
in Error.

Acceptance of service of within petition for writ of error acknowledged this 16th day of June, 1922.

THOS. R. REVELLE,

U. S. Attorney.

By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [3]

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In the United States District Court, Western District of Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Assignment of Errors.**

Comes now the above-named defendant, Burrell Johnson, and in connection with his petition for writ of error in this case submitted and filed, herewith assigns the following errors, which the defendant avers and says occurred in the proceedings and



at the trial in the above-entitled cause, in the above-entitled court, upon which he relies to reverse, set aside and correct the judgment and sentence entered herein. He says that there is manifest error appearing upon the face of the records and in the proceedings in this:

1. The defendant at the close of the Government's evidence moved the Court to direct the jury to return a verdict of "not guilty," which motion was denied by the Court, and to which ruling the defendant then and there excepted for the reason and upon the ground that no crime, misdemeanor or offense under the laws and statutes of the United States had been proven against the defendant, and because the offense charged in the indictment had not been proven; which exception was by the Court allowed; and now the defendant assigns as error the ruling of the Court upon the motion.

2. Defendant again at the close of all the evidence in the case moved the Court to direct the jury to return a verdict of "not guilty," which motion was denied by the Court, and to [14] which ruling the defendant then and there excepted for the reason and upon the ground that no crime, misdemeanor or offense under the laws and statutes of the United States had been proven against the defendant, and because the offense charged in the indictment had not been proven; which exception was by the Court allowed; and now the defendant assigns as error the ruling of the Court upon said motion.

3. Thereafter and within the time limited by law and the rulings and orders of the Court, the de-

fendant moved the Court for an order setting aside the verdict of the jury and granting to him a new trial, which motion was denied by the Court, to which ruling of the Court the defendant then and there duly excepted and the exception was by the Court allowed; and now the defendant assigns as error the ruling of the Court upon said motion.

4. The Court thereafter entered judgment and sentence against said defendant upon the verdict of "guilty" rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, which exception was by the Court allowed; and now the defendant assigns as error the court so entering judgment and sentence upon said verdict.

And as to each and every assignment of error as aforesaid defendant says that at the time of making the order or ruling of the Court complained of, the defendant duly asked and was allowed an exception to the ruling and the order of the Court.

R. J. MEAKIN,

Attorney for Defendant.

Service of foregoing assignment of errors received and copy thereof admitted this 16th day of June, 1922.

THOS. P. REVELLE,

U. S. District Attorney.

By E. D. DUTTON. [15]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Order Allowing Writ of Error and Fixing Amount  
of Supersedeas Bond.**

A writ of error is granted herein this 16th day of  
June, 1922; and it is further

ORDERED that the said defendant be admitted  
to bail and that the amount of supersedeas bond to  
be filed by said defendant be fixed in the sum of  
fifteen hundred dollars (\$1500.00).

AND IT IS FURTHER ORDERED that upon  
said defendant, Burrell Johnson, filing his bond in  
the aforesaid sum in due form to be approved by  
the clerk of this court, he shall be released from  
custody pending the determination of the writ of  
error herein assigned.

Done in open court this 16th day of June, 1922.

JEREMIAH NETERER,

Judge.

Service of the foregoing order, and receipt of  
copy thereof admitted this 16th day of June, 1922.

THOS. P. REVELLE,

U. S. District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Supersedeas Bond.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Burrell Johnson, as principal, and Harold B. Taylor unmarried and George R. Ford of Seattle, King County, Washington, as sureties, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of fifteen hundred dollars (\$1500.00), for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-named defendant, Burrill Johnson, was on the 16th day of June, 1922, sentenced in the above-entitled cause to serve two years in the



U. S. Penitentiary at McNeil Island, Washington for violation of the act of October 17, 1919.

And, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit;

And, whereas, the above-entitled Court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of fifteen hundred dollars, (\$1500.00). [18]

Now, therefore, if the said defendant, Burrill Johnson, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amendable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender himself and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court,



then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 16 day of June, 1922.

BURRILL JOHNSON.

HAROLD B. TAYLOR.

GEORGE R. FORD. [19]

United States of America,  
State of Washington,  
County of King,—ss.

George R. Ford, unmarried man, being first duly sworn, each for himself and not one for the other, on oath, says:

I am a resident of the State of Washington, over the age of twenty-one years, and not an attorney or counselor at law, sheriff, clerk of the Superior Court or other *office* of such court, or of any court; that I am worth, over and above all debts and liabilities, and exclusive of property exempt from execution, in real estate situate within King County, State of Washington, as follows: Lots 18, 19, 20, 21, Block 21, Replat of Blocks 5, 6, 7, 8, Factoria Add King County, Wash.

GEORGE R. FORD.

Subscribed and sworn to before me this 16th day of June, 1922.

[U. S. District Court Seal]

FRANK L. CROSBY, Jr.,

Deputy Clerk U. S. District Court, Western District  
of Washington. [20]

United States of America,  
State of Washington,  
County of King,—ss.

Harold B. Taylor, unmarried, being first duly sworn, each for himself and not for the other on oath says:

I am a resident of the State of Washington, over the age of twenty-one years and not an attorney or counselor at law, sheriff, clerk of the Superior Court of other *office* of such court, or of any court; that I am worth, over and above all debts and liabilities and exclusive of property exempt from execution, in real estate situate within King County, State of Washington, as follows: Lot 16, Block 11 Cowan's University Addition to Seattle, Wn. and Tract 1, Block 14 of 1st Addition to Lake Forest Park; both free from incumbrance.

HAROLD B. TAYLOR.

Subscribed and sworn to before me this 16th day of June, 1922.

[U. S. District Court Seal]

FRANK L. CROSBY, Jr.,  
Deputy Clerk U. S. District Court, Western District  
of Washington.

Approved the 16th day of June, 1922.

NETERER,  
Judge.

O. K.—J. F. FALKNOR,  
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Order Extending Time to and Including July 31,  
1922, to Serve and File Bill of Exceptions.**

For good cause now shown, it is ORDERED that the time within which the defendant shall serve and file his proposed bill of exceptions in the above-entitled cause be and the same hereby is extended to and including the 31st day of July, 1922.

NETERER,

United States District Judge.

O. K.—J. F. FALKNOR,

Asst. U. S. Atty.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

BURRELL JOHNSON,  
Defendant.

**Order Extending Time to and Including August 31,  
1922, to File Bill of Exceptions and to File  
Record and Docket Cause.**

For good cause shown it is ORDERED, that the time within which the defendant shall serve and file his proposed bill of exceptions, and serve and file his record in the above-entitled cause in the Circuit Court of Appeals be and the same is hereby extended to and including the 31st day of August, 1922.

Done in open court this 31st day of July, 1922.

JEREMIAH NETERER,

United States District Judge.

O. K.—THOS. P. REVELLE,

JUDSON F. FALKNOR,

U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 31, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court for the Western District of Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Order Extending Time to and Including September 30, 1922, to File Bill of Exceptions and to File Record and Docket Cause.**

For good cause shown it is ORDERED that the time within which the defendant shall serve and file his proposed bill of exceptions, and serve and file his record in the above-entitled cause in the Circuit Court of Appeals, be and the same is hereby extended to and including the 30 day of September, 1922.

Done in open court this 11th day of September, 1922.

JEREMIAH NETERER,  
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 11, 1922. F. M. Harshberger, Clerk.  
[24]



United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

BURRELL JOHNSON,  
Defendant.

**Order Extending Time to and Including October  
10, 1922, to File Bill of Exceptions and to File  
Record and Docket Cause.**

For good cause shown it is ORDERED, that the time within which the defendant shall serve and file his proposed bill of exceptions and serve and file his record in the above-entitled cause in the Circuit Court of Appeals be and the same is hereby extended to and including the 10th day of October, 1922.

Done in open court this 27 day of September, 1922.

JEREMIAH NETERER,  
United States District Judge.

O. K.—JOHN A. FRATER,  
Asst. U. S. Attorney.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 27, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that this cause came on  
regularly to be heard on this, the 5th day of June,  
1922, before the Hon. Frank H. Rudkin, the plain-  
tiff appearing by Judson F. Falknor, Esq., Assistant  
United States Attorney; and the defendant appear-  
ing by R. J. Meakim, Esq.; whereupon the following  
testimony was offered and proceedings had, to wit:  
[26]

Upon a jury being regularly and duly empaneled  
and sworn to try said cause, and the United States  
Attorney having made his opening statement, the  
following proceedings were had:

**Testimony of Wilfred H. Crabtree, for the  
Government.**

WILFRED H. CRABTREE, called as a witness  
on behalf of the Government, and being first duly  
sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

My name is Wilfred H. Crabtree and I am a

(Testimony of Wilfred H. Crabtree.)

physician practicing in Boston with office address at 205 Beacon Street, in the residential district of that city. I bought this Nash auto from the Nash agency in Boston on June 24, 1921, with engine number 82424 and I have the original bill of sale.

(The bill of sale was thereupon admitted as Government's Exhibit "A.") [27]

I left the machine in front of my office about three o'clock in the afternoon of November 10, 1921, and it was gone at a quarter of six the same afternoon when I went after it and I did not see the car again until this morning at the South End Garage at Seattle, where I was taken by Mr. Read of the Department of Justice and Mr. Smith of the Seattle City Police. The car I saw this morning at the South End Garage at Seattle is my car. I can positively identify it by certain characteristics on my car which are as follows: The standards of the windshield have been raised on each side by putting a brass washer on either side. This was done by myself at the Nash Service Station at Boston and I find this to be the condition on the car I saw this morning. Also my car had some cement put around the hot air pipe right over the exhaust of the carburetor, and that is the same as the car I saw in Seattle this morning. Also on my car, the left front curtain had two holes in it in the front. I found the curtain on the car I saw this morning to be in the same condition and I have that curtain with me.

(Curtain received in evidence, marked Government's Exhibit No. 2.)

(Testimony of Wilfred H. Crabtree.)

I had a Ford oil can on my car in Boston and I found a Ford oil can on the car this morning. (Witness identifies an oil can as the can he found on the car at Seattle.)

(Oil can received in evidence, marked Government's Exhibit No. 3.)

A few days before November 10, 1921, when I stopped at the office to go into my office, I noticed a young man standing on the corner. My office building is the next building to the corner; he was standing on the corner of the street and I thought at the time he looked as though he had no business around there. He was a smooth-shaven young [28] man along about twenty-five, rather heavy shoulders, and he wore a gray suit and a cap. I cannot swear that the defendant is the man, but I have the feeling that I have seen the defendant before. This is as much as I can say on that. I am not positive on that and don't care to swear that it is the same man.

Cross-examination.

(By Mr. MEAKIM.)

The reason I think it was stolen November 10th is because that is the day I left it in front of the office and went out and found it gone. I remember it was November 10th just as you remember any important date. That was a matter of importance. I am a married man and no other member of my family drives the car. I have no reason to believe that it was stolen except that it was not in front of the building *when* I left it.



(Testimony of L. S. Read.)

Q. Now, you refuse to identify him (the defendant), do you?     A. Yes, sir.

**Testimony of L. S. Read, for the Government.**

L. S. READ, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

I am a special agent of the Department of Justice. I was looking for a stolen car and on February 15th I took the defendant to the Bureau office and questioned him. Officers Worsham and Smith were with me. The defendant had a Nash car at that time. I had no warrant. He stated that he and his wife left Seattle September 27th, 1921, in a 1918 Studebaker and drove east, visiting Boston, Chicago and back through Miami. He stated that he had been in Boston in the early [29] part of November and came back from Boston to Seattle. I found him in possession of a Nash automobile. I examined his Nash car and found the serial number to be 193301 and the motor number was 85678; these numbers were on detachable plates on the motor of the machine. I, accompanied by the defendant and Mr. Smith, visited the local Nash office and disassembled the motor to ascertain what the secret number was, and found the true number to be 82424. The defendant, responding to my question, said he had had a bill of sale but had lost it and did not remember the name of the man from whom he bought



(Testimony of L. S. Read.)

the Nash, nor did he remember the locality where he had purchased the car.

Cross-examination.

(By Mr. MEAKIM.)

The defendant told me he bought the car in Pawtucket, Rhode Island; I took the machine from him several days later; I never arrested him; the machine was placed in Police Headquarters by Officer Smith and the defendant and myself were with him and the defendant was not under arrest. I met the defendant at the Times office and requested him to come to the Bureau office on February 15th and he stayed about forty-five minutes. He drove us, at my request, to Police Headquarters where I raised the hood and looked at the numbers and saw that they had been "jimmied." I released the car to him and the following day he drove us to the Nash people and I found the numbers as I have said. We then went to Police Headquarters and put the car in. We discovered the correct motor number to be 82424, and that is on the car yet; the serial number is 193301, shown on an aluminum plate, readily seen when the hood is lifted and the other number can only be found by taking down some of the parts. The number looked like it had been pried off; it is put on with brass tacks, and was [30] on it this morning and is in the same condition as when I first saw it and was never loosened by me; the defendant went to the police station with me twice, and visited my office and the Nash office at least once. The defend-

(Testimony of L. S. Read.)

ant, after the car was taken from him, visited my office the following day and again on the following Monday. He said he got the car in Pawtucket, R. I., and gave his Studebaker and \$300.00 for it. I have not been able to find the Studebaker, although I have made every possible effort to locate it. A license for the Nash car was obtained in Rhode Island on November 8th, two days before the car was stolen, and the number now on the car was given in the application. I did not notice what license was on the car when I first saw it when he told me had just returned from his trip through Los Angeles and Portland. I checked the license at the City-County Building, but I could not tell what license he has as he owned so many automobiles. I did not investigate whether he had a California license; I tried to locate this Studebaker car, but have not been able to do so, although I have tried to ascertain from the directors of Motor Vehicle Licenses in about fourteen States, trying to locate this Studebaker car; also some telegrams to Pawtucket trying to locate it, but have been unable to do so.

Redirect Examination.

(By Mr. FALKNOR.)

I procured a certified copy of the license on the Nash car issued in Rhode Island.

(Certified copy of license received and marked Plaintiff's Exhibit No. 4.)

**Testimony of W. E. Worsham, for the Government.**

W. E. WORSHAM, called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows: [31]

Direct Examination.

(By Mr. FALKNOR.)

I was present in Mr. Read's office when Mr. Johnson was interrogated on February 15th; he told us he left Seattle in September, 1921, with his wife and went East through New York State and said he had been in Boston along in November, I believe; he returned through Miami, Florida, the southern route to California, stopped in Los Angeles a while, then through Frisco and back to Seattle; he said he had lost his bill of sale and he could not remember the street number of the man from whom he had bought it; he was apprehended with this particular Nash car in his possession.

Cross-examination.

(By Mr. MEAKIM.)

The car is now in the South End Garage; we took it there from headquarters where it was brought by Detective Smith and Mr. Read a day or two following our conversation at the Department of Justice office. I believe Sergeant Witske and Detective Smith arrested him; he said he got the car in Pawtucket, R. I., in November. He went to Washington, D. C., and then to Miami, Florida; he said he had been picked up and investigated over this car in Miami, Florida; I know this was true as we

(Testimony of W. E. Worsham.)

got some wires from the Chief of Police down there regarding them; we wired them he had no Nash car here; I saw the car several times after it had been taken away from the boy and the engine number was in plain sight when the hood was lifted; the serial plates—motor plates—had been changed on that car; the number had been tampered with, the plate had been changed; the plates looked like they had been jimmied and they are not the same Nash screws that are originally put in; they show evidence of being taken off and put on. When we were talking to him he said the ownership [32] of the car had been investigated in Miami, Florida, and that the police had released the car to him. I am a city detective and have been in the automobile detail for five years; I am very familiar with stolen cars and the methods used to hide them; there was nothing suspicious about the car any more than the number plates showed they had been tampered with; there were different screws holding them on than the Nash puts on; it had a Nash number and the figures looked all right, although they looked as though they had been detached and placed on.

**Testimony of Joseph P. Smith, for the Government.**

JOSEPH P. SMITH, called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

I am a city detective and was present when the



(Testimony of Joseph P. Smith.)

defendant was asked about this car; he said he went east in September and was in Boston early in November, then went to Miami and back through Los Angeles and thence to Seattle. He had this Nash car and said he had lost or misplaced the bill of sale; he did not remember the name of the man from whom he purchased it or his street number and we all went to the Nash Garage with the car and found the true engine number to be 82424. The numbers on the outside of the motor looked as though they had been changed.

#### Cross-examination.

(By Mr. MEAKIM.)

The rivets had been pried off and replaced and the plates were loose when we first looked at the car; the number is on an aluminum strip and the rivets appear to have been taken out and replaced. I took the defendant [33] down to the station; Mr. Read was with me and put the car in the locker; aside from the fact that the number was hanging by one end when I saw it, there is nothing else that is suspicious or to be suspicious about. I never had but one conversation with the defendant.

#### Redirect Examination.

(By Mr. FALKNOR.)

The defendant was arrested by a deputy marshal. Whereupon the Government rested.

Whereupon the defendant challenged the sufficiency of the Government's evidence, and moved the Court to instruct the jury to return a verdict of not



(Testimony of Burrell Johnson.)

guilty, for the reason and upon the ground that the offense charged in the indictment had not been proven, and no sufficient evidence thereof had been introduced to warrant giving the case to the jury. The defendant further moved to strike the testimony and the exhibits for the reason that the same were without warrant in law and against the statute on Searches and Seizures. The defendant further moved on the ground that the Government had failed to establish that the car was stolen and failed to show that the defendant knew that the car was stolen and to establish that it was stolen at all.

The motion was denied. Whereupon the defendant duly excepted to the ruling of the Court and his exception was by the Court allowed.

Thereupon the defendant's opening statements to the jury having been made by his counsel, the following testimony was [34] introduced on behalf of the defense.

### **Testimony of Burrell Johnson, in His Own Behalf.**

BURRELL JOHNSON, the defendant, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

(By Mr. MEAKIM.)

I am the defendant and I started east in September, 1921, driving a 7-passenger Studebaker, going through Chicago, Cleveland, Boston, Providence, Miami, Los Angeles and reached Seattle February 14, 1922. I am and have been a newspaper

(Testimony of Burrell Johnson.)

distributor for the Times and P. I. for five years and am a married man and my wife was with me on the trip. I contemplated trading my car and read the ads in different cities and tried to make a trade in Cleveland, Ohio. I arrived in Providence, R. I., on the night of November 7th and left Boston on the 7th and was there about ten days previous; stayed in Providence the night of November 7th; I left Providence about noon on November 8th and went to visit an aunt and came back through Providence again on Saturday, November 12th, on Tuesday, November 8th I saw an ad in either the evening or morning paper; I read them both, and saw a car advertised, giving an address in Pawtucket, and I went out there and looked it over and contemplated making a trade, and finally got to an agreement where I was to pay \$300.00 difference and give my '18 seven-passenger Studebaker for an early '21 Nash car, I believe it was, and I went down to the State House in Providence—Pawtucket and Providence, I explained to you was similar, they run together, and we went down there to the State House in Providence and applied for a license; I was to come back in a couple of days and get the car provided I got the license; they issued a license and I did that. I applied for the license about noon time at the State House with the man I was trading with. I deposited \$50.00 with him. This was the office of the State Board of Public Roads, State House, [35] Providence, Rhode Island; I filled out the blank and I was told that they had to mail me a registration

(Testimony of Burrell Johnson.)

card; that was the same as the State of Washington, a post card or a paper certificate showing they issued a license; they don't give them to you, they have to mail it to you, so I had it mailed to me in Pawtucket. The envelope that I now have here is the identical envelope in which the license was mailed to me. I carried the certificate to California and then took out a California 1922 license. I agreed to trade on condition that I got the certificate and ordered it sent to Pawtucket, General Delivery, as I used the general delivery in all cities. I then went to Leominster, in North Central Mass., to see my aunt and remained four days, then went back to Pawtucket to make the deal; I got the license at the postoffice and went over to see the car and see it was as it was, complete tools and tires were good, and then I exchanged my stuff from the Studebaker and put them in there, and went in with him and made out a bill of sale to each other; I turned my car over to him and he turned his car over to me, and then we went down to Providence and went to Hartford that night; there was nothing particularly interesting in Providence; I have an aunt that lives in Hartford and we went over there and stayed there for a while. I bought and paid for the car at the owner's house, I think in Pawtucket; it seems to be nearest the business district of Pawtucket although Pawtucket and Providence run together; it was in the residential district and when I closed the deal my wife was with me. Then we went on through New York and south; I had

(Testimony of Burrell Johnson.)

this car repaired by Nash agencies in Washington, D. C., Jacksonville, St. Augustine, Florida, El Paso and Los Angeles. I was in New York eight days and the car was in dead storage there one week. I was in Washington, D. C., one week. I was arrested in Miami for assault while working on a newspaper and the police took the car and examined it and returned it. I [36] went to California, arriving January 15th and got a tourist permit in exchange for my Rhode Island license. The day I got back I was in the "Times" office and Mr. Read came in and asked a few questions about my cars and I took him out and showed him the Nash; he asked me to see him the next morning and I did and he and two officers asked me about the trip and then I drove them to the Nash company and they asked me to drive to the police station and then they took the car away from me; that was the last I saw of the car. The number was on an aluminum plate and was not hanging by one screw and was in good condition and there was nothing unusual about it. I think the police at Miami took the number off at that time to look underneath it to see if there was another number and then put it back on again. The bill of sale was made in the house of the man I bought the car from. I made him one and he made me one and I gave him the balance of the money. I don't remember the street number, there are so many numbers there. I don't know the exact address. I did not know that the car was stolen and I do not believe so now and I never concealed it;



(Testimony of Burrell Johnson.)

I never had a gray suit of clothes and I had only a dark suit while making this trip.

Cross-examination.

(By Mr. FALKNOR.)

I arrived in Boston the latter part of October and was in Providence November 7th and Pawtucket November 8th; I read the paper November 7th and first saw the machine November 8th and applied for the license November 8th but did not receive it at that time. I am not well acquainted around Boston, I lived there when I was nine years old and have never been back there since. I don't know anyone in Boston but have relatives in New England. Pawtucket is probably 70. miles from Boston. I started negotiations for the car November 8th and got the bill of sale November 12th; the bill of sale is either mislaid or lost. I put it in some of my clothes or some of my suit cases, when I got the car, I believe in my pocket [37] and I never had occasion to look for it again until I was down in Miami, and at that time in Miami my wife went with the officers over to the house and looked in the suit cases to find it, and they could not find it. I have had several cars and usually put the bill of sale in my desk. I don't remember the man's name but would know it if I heard it; he was about my build, perhaps a little stouter, I should judge about 35 years old; I don't know his business and his hair was either brown or dark, it was not light and he was clean shaven. I saw him twice and the car twice. The first time November 8th



(Testimony of Burrell Johnson.)

when I agreed to buy it provided they issued me a license and I paid \$50.00 at that time and \$250.00 later. I had the \$300.00 with me and it was part of my earnings. I went to Providence in the middle of the afternoon; I tried to trade my car in Cleveland. The Nash was a 1920 or '21; my car was 1918 Studebaker worth at least \$1000.00, the Nash was worth about \$900.00. The man lived in the section between Pawtucket and Providence and not on the main street where the car line is; I believe he was a married man as I saw a woman around the house. I did not steal the plates and did not put them on the car and it was not loose when I got here. It was taken off in Miami. I was arrested in Miami, selling papers on the street after an altercation with a newsboy. The police investigated the car. I have three cars; a Studebaker, an Overland and a Dodge used in distributing newspapers; I now have a 1918 Studebaker. I have had 10 or 12 cars and used them every day in my business.

Redirect Examination.

(By Mr. MEAKIM.)

In New York some of my tools were missing and the police looked over the car. The money I had was sent from Seattle by my father and was my own money.

**Testimony of E. J. Romano, for Defendant.**

E. J. ROMANO, called as a witness on behalf of the defendant, being first duly sworn, testified as follows: [38]

**Direct Examination.**

(By Mr. MEAKIM.)

I have been in the auto repair business 18 years and am familiar with Nash cars. I examined this Nash car on March 16th and examined the numbers. The number I saw was on the starter, it was loose, at that time at one end, otherwise it didn't seem to have been molested with in any way; the numbers seemed to be very clear; I could not see where they used any chisel on it to put new numbers on it. It is an aluminum plate attached with rivets and it showed no evidence of having been injured or tampered with that I could see. I have sold a number of used cars and examined and used the Nash cars; I have not sold any Nash cars. I know the value of used Nash cars, Cars are cheaper in the east than here because of a greater field and less freight. I did not see anything about this car to make anyone suspicious.

**Cross-examination.**

(By Mr. FALKNOR.)

Freight from Detroit to Boston is less than to Seattle; I sell a number of cars; it was dark when I examined the car; I could not tell that it was a stolen car.

(Testimony of E. J. Romano.)

Redirect Examination.

(By Mr. MEAKIM.)

I held an electric light in my hand when I examined the car.

**Testimony of William L. Forrest, for Defendant.**

WILLIAM L. FORREST, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MEAKIM.)

Until a year ago I was circulation manager of the P. I. for the previous three years; the defendant was under me as district manager for Capitol Hill; he handled and sold papers for us, handling the cash and paying us each month for the papers sold; probably [39] in the neighborhood of four or five hundred dollars a month. His general reputation in the community is very good.

**Testimony of Mrs. Dorothy Johnson, for Defendant.**

Mrs. DOROTHY JOHNSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MEAKIM.)

I am the wife of the defendant and was with him on the trip; we arrived in Boston the latter part of October and remained there until about the 7th and then went to Pawtucket and Providence and arrived on the 7th of November in the evening, left the next afternoon and went to Leominster,

(Testimony of Mrs. Dorothy Johnson.)

Mass., to visit relatives and stayed four days, then went back to Province and Pawtucket. My husband went into this man's house and gave him the bill of sale, I sat in the Studebaker; my husband came out; I never heard anything; I saw the house, and my husband went in, and he came out and drove the car around the block, the Nash, and the other man drove the Studebaker around the block. We went back through Providence to Hartford that night. We stopped at several Nash garages. In Miami I went down to pay his fine driving the Nash car.

"Q. What happened in Miami, Florida, with reference to this machine?

Mr. FALKNOR.—I object to this as immaterial.

The COURT.—The question whether or not this car was stolen is the issue; whether he knew it or the Chief of Police down in Florida; I will sustain the objection.

Mr. MEAKIM.—You sustain the objection as to what occurred in Miami?

The COURT.—Yes."

My husband had no gray suit this trip; he wore corduroy trousers and puttees most of the time.

Cross-examination.

(By Mr. FALKNOR.)

My husband wore a cap; I saw the man once who sold the Nash; he [40] came out while I sat in the car; he was forty at least, smooth shaven, dark hair, black derby hat. I saw a lady around his house. I know Mrs. Holmes in Seattle, she is a friend of mine. I put the money I got from my



(Testimony of Mrs. Dorothy Johnson.)

father in with my husband's money. I don't know how much he put in to buy the car. I had \$300.00; his father and mother sent him money all the time while we were gone. I gave it to him in Kentucky; I don't know when we spent it. I did not tell Mrs. Holmes that the money from my father was used to buy the car.

Redirect Examination.

(By Mr. MEAKIM.)

My husband got money from him in Chicago, some in the east and some in New York. He carried the money and paid the bills.

Recross-examination.

(By Mr. FALKNOR.)

I took money down in Miami and paid his fine, \$4.85 more than he had with him.

**Testimony of Schuyler C. Johnson, for Defendant.**

SCHUYLER C. JOHNSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MEAKIM.)

I am the father of the defendant; we sent him money; he made arrangements before he went that he would let us know from time to time where he was and that we should send him money from his own earnings; we did that at frequent intervals, once by postoffice order and the rest of the time



(Testimony of Schuyler C. Johnson.)  
by bank draft. My son was 9 or 10 when we left Boston 14 years ago.

Cross-examination.

(By Mr. FALKNOR.)

My son was 9 or 10 years old when we left Boston.  
[41]

**Testimony of W. E. Worsham, for Defendant (Recalled).**

W. E. WORSHAM, recalled on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. MEAKIM.)

I have been in the auto detail gathering up cars a number of years and gathered something like 55 in last December. There was nothing particularly suspicious looking about this Nash when I first saw it.

Thereupon the defense rested.

Thereupon the Government introduced the rebuttal.

**Testimony of Mrs. Edna Holmes, for the Government (In Rebuttal).**

Mrs. EDNA HOLMES, called as a witness on behalf of the Government in rebuttal, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

I knew Mrs. Johnson; she told me shortly after they returned from Seattle that the Nash car was

(Testimony of Mrs. Edna Holmes.)

purchased by money that she got from her father in Kentucky.

Cross-examination.

(By Mr. MEAKIM.)

She said her father had given her the money and they had bought the car. My husband is a city patrolman.

**Testimony of Burrell Johnson, in His Own Behalf  
(Recalled).**

BURRELL JOHNSON, the defendant, recalled, testified in his own behalf as follows:

Direct Examination.

(By Mr. MEAKIM.)

The present Studebaker automobile which I have was bought on a bill of sale made by the Seattle Automobile Sales Company, dated March 9, 1922.

(Bill of sale received in evidence, and marked Defendant's Exhibit "C.")

Whereupon the testimony closed and both sides rested. [42]

Thereupon the defendant renewed the motion made at the close of the Government's case, for the reasons then given, and for the further reason the evidence was not sufficient to go to the jury and defendant further moved to strike any evidence and warn the jury against considering any testimony regarding his identification.

"The COURT.—I don't think the evidence as to identification amounts to anything; the other motions are denied."

To which ruling the defendant then and there excepted, which exception was allowed.

Argument of counsel to the jury being heard the Court thereupon instructed the jury as to the law and the premises to which no exceptions were taken. Whereupon the jury retired to deliberate upon their verdict.

Thereafter on the same day the said jury returned into court and rendered their verdict finding the defendant guilty as charged in the indictment.

Thereafter the defendant duly filed his written motion now on file herein praying that the verdict of the jury be set aside and a new trial granted him.

Thereafter and on June 16, 1922, the said motion came duly on for hearing before the Court, and after argument of counsel the Court denied said motion, to which ruling of the Court the defendant excepted, and his exception was by the Court allowed.

Whereupon the Court did pronounce sentence upon the said defendant that he be imprisoned in the United States penitentiary, McNeil's Island, Washington, for a period of two years.

And, now, in furtherance of justice, and that right may be done, the said defendant, Burrell Johnson, tenders and presents to the Court the foregoing as his bill of exceptions in the above entitled cause, and prays that the same may be settled and [43] allowed and signed and sealed by the Court and made a part of the record in this case.

R. J. MEAKIM,  
Attorney for the Defendant.

Service of copy hereof acknowledged this 11th day of September, 1922.

THOS. P. REVELLE,  
United States Attorney.  
By E. D. DUTTON.

O. K.—JOHN A. FRATER,  
Asst. U. S. Atty. [44]

The defendant, Burrell Johnson, having tendered and presented the foregoing as his bill of exceptions in this cause to the action of the Court, and in furtherance of justice and that right may be done him, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court, and made a part of the record herein, and the Court having considered said bill of exceptions, and all objections and proposed amendments made thereto by the Government, and being now fully advised, does now in furtherance of justice and that right may be done the defendant, sign, seal, settle and allow said bill of exceptions as the bill of exceptions in this cause, and does order that the same be made a part of the record herein.

The Court further certifies that each and all of the exceptions taken by the defendant, as shown in said bill of exceptions, were at the time same were taken, allowed by the Court.

The Court further certifies that said bill of exceptions contains all material matters and evidence material to each and every assignment of error made by the defendant and tendered and filed in Court in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions was filed and presented to the Court within the time provided by law, as extended by the orders of the Court heretofore made herein.

Done and ordered in open court, counsel for the Government and the defendant being now present, this 25 day of September, 1922.

F. H. RUDKIN,  
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sept. 27, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

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In the United States District Court, Western District of Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

BURRELL JOHNSON,  
Defendant.

**Order Transmitting Original Exhibits to Circuit  
Court of Appeals.**

Upon good cause shown it is hereby ORDERED, that there shall be forwarded by the clerk of this court to the Circuit Court of Appeals in the above-



entitled cause the original exhibits heretofore filed herein, as follows, to wit:

Exhibit No. 1—Bill of Sale.

Exhibit No. 4—Copy of License.

Exhibit "C"—Bill of Sale.

And that said exhibits need not be printed.

JEREMIAH NETERER,

U. S. District Judge.

O. K.—THOS. P. REVELLE.

JUDSON F. FALKNOR,

U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 2, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [46]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the Circuit Court of Appeals of the Ninth Circuit Court, in the above-entitled cause, and include therein the following:

Indictment.

Arraignment.

Plea.

Record for trial and empanelling jury.

Verdict.

Motion for new trial.

Hearing on motion for new trial.

Judgment and sentence.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error and fixing supersedeas.

Supersedeas bond.

Order extending time for filing bill of exceptions.

Order extending time for filing bill of exceptions  
and record.

Order extending time for filing bill of exceptions  
and record.

Bill of exceptions.

Order to forward original exhibits.

Praecipe.

R. J. MEAKIM,

Attorney for Defendant. [47]

I waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided under rule 105, of this Court.

R. J. MEAKIM,

Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sept. 22, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [48]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 48, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 107 folios at 15c. ....\$16.05

[49]

Certificate of Clerk to transcript of record,  
4 folios at 15c. ....\$ .60  
Seal to said certificate' ..... .20  
Certificate of Clerk to original exhibits, 3  
folios at 15 cents. .... .45  
Seal to said certificate ..... .20

I hereby certify that the above cost for preparing and certifying record, amounting to \$17.50, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 2d day of October, 1922.

[Seal]

F. M. HARSHBERGER,  
Clerk United States District Court, Western District of Washington. [50]

United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America, to  
the Honorable Judges of the District Court of  
the United States for the Western District of  
Washington, Northern Division, GREETING:

Because in the record and proceedings as also in  
the rendition of the judgment of a plea which is in  
said District Court, before the Honorable Frank  
Rudkin, between Burrell Johnson, the plaintiff in  
error, and the United States of America, the de-  
fendant in error, a manifest error hath happened to  
the prejudice and great damage of Burrell Johnson,  
plaintiff in error, as by his complaint and petition  
herein appears, and we being willing that error, if  
any hath been, should be duly corrected, and full  
and speedy justice done to the party aforesaid in  
this behalf, DO COMMAND YOU, if judgment be  
therein given, that under your seal, distinctly and  
openly, you send the record and proceedings with all  
things concerning the same, to the United States



Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, together with this writ, so that you have the same at said City of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then [51] and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable HOWARD TAFT, Chief Justice of the United States, this 20th day of June, 1922, and the year of the Independence of the United States, one hundred and forty-fifth.

[Seal]

F. M. HARSHBERGER,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Acceptance of service of within writ of error acknowledged this 24th day of June, 1922.

THOS. P. REVELLE,

C. P.

Attorney for Plaintiff. [52]

Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 24, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

United States District Court, Western District of  
Washington, Northern Division.

No. 6630.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURRELL JOHNSON,

Defendant.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
the United States of America and to THOMAS  
R. REVELLE, United States Attorney for the  
Western District of Washington, Northern Di-  
vision, GREETINGS:

You are hereby cited and admonished to be and  
appear before the United States Circuit Court of  
Appeals for the Ninth District at San Francisco  
in the State of California within thirty (30) days  
of the date hereof pursuant to a writ of error  
signed in the clerk's office of the *of the* United States  
District Court for the Western District of Wash-  
ington, Northern Division, wherein Burrell John-  
son is plaintiff in error and the United States of  
America the defendant in error to show cause, if  
any there be, why judgment in said writ of error  
should not be corrected and speedy justice should  
not be done to the party in that behalf.

WITNESS the hand and seal of the Honorable  
FRANK H. RUDKIN, Judge of the District Court

of the United States for the Western District of Washington, Northern Division, this 16th day of June, 1922.

[Seal]

JEREMIAH NETERER,

U. S. District Judge.

Acceptance of service of the within citation on writ of error acknowledged this 16th day of June, 1922.

THOS. P. REVELLE.

By E. D. DUTTON. [53]

Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

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[Endorsed]: No. 3931. United States Circuit Court of Appeals for the Ninth Circuit. Burrell Johnson, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received October 5, 1922.

F. D. MONCKTON,

Clerk.

By Paul P. O'Brien,

Deputy Clerk.

Filed October 10, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the  
**United States Circuit Court  
of Appeals**  
For the Ninth Circuit

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No. 3931

BURRELL JOHNSON, *Plaintiff in Error*

*vs.*

THE UNITED STATES OF AMERICA,  
*Defendant in Error*

WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DIS-  
TRICT OF WASHINGTON, NORTHERN DIVI-  
SION

HONORABLE FRANK H. RUDKIN, JUDGE

BRIEF OF PLAINTIFF IN ERROR

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R. J. MEAKIM  
ATTORNEY FOR PLAINTIFF IN ERROR  
313 NEW YORK BUILDING, SEATTLE, WASHINGTON





In the  
**United States Circuit Court  
of Appeals**  
For the Ninth Circuit

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No. 3931

BURRELL JOHNSON, *Plaintiff in Error*  
*vs.*

THE UNITED STATES OF AMERICA,  
*Defendant in Error*

WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DIS-  
TRICT OF WASHINGTON, NORTHERN DIVI-  
SION

HONORABLE FRANK H. RUDKIN, JUDGE

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BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

The defendant, a resident of Seattle for many years, married and owning his own business, owner of a Studebaker automobile, left Seattle in September, 1921, travelling with his wife across country

and arrived in Providence, Rhode Island, in the afternoon of November 7, 1921. Having previously attempted to trade his car, he read in a Providence paper an advertisement giving a local address where a car for trade could be found. The following day he called at this location, a private house, the street number of which he can not recall, and a Nash car was exhibited to him by the man living in the premises; he examined the car and they finally agreed to trade machines, the defendant to pay a \$300.00 difference in cash. The defendant paid down \$50.00 to bind the bargain, agreed to make the trade if a license was issued to him and, accompanied by the owner of the Nash, visited the office of the State Board of Public Roads, State House, Providence, R. I., and applied for a license on the Nash; he filled out the blank furnished him, giving his correct name and residence address. (Pltff's Ex. No. 4.) He was informed that some time must elapse between the filing of the application and the issuance of the license and he thereupon requested that it be mailed to him. Driving his Studebaker, he and his wife left Providence and drove to Leominster, Mass. to visit relatives. Four days later he returned, found the license in the post-office, and accompanied by his wife, drove to the residence of the Nash own-

er. He again examined the car and, noting nothing unusual about it, exchanged his Studebaker for it and paid over the balance of the cash; at this time each man drove the other's car around the block as a final demonstration. Each then delivered to the other an informal bill of sale and the defendant and his wife drove away in the Nash. They stopped to visit an aunt in Hartford, Conn., and drove down the East coast through New York, Washington and other cities, stopped at several Nash agencies for repairs, and then reached Miami, Florida. Here, because of an altercation with a newsboy, the defendant was arrested for violation of a city ordinance; he gave his true name and address and the police, having seized the Nash car, wired to Seattle, verified his statements and released the car to him; here the wife attempted to show the police the bill of sale but was unable to find it. Thereafter he drove leisurely to California, arriving there January 15, 1922; here he exchanged his Rhode Island license for a California tourist permit, giving his correct name and address, and drove up the coast arriving in Seattle, February 14, 1922. The following day, an agent of the Department of Justice, looking over cars, interviewed him at his place of business; the defendant explained his trip and the

manner of acquiring the Nash, stating that the bill of sale was lost. Within the next few days he, at the request of the agent, visited the latter's office at least twice and the police station once, and again explained the situation; then he drove the car to the local Nash agency and at this shop, after taking down some of the parts, it was discovered that the number shown on the parts, viz. 82424, did not agree with the number shown on the detachable number plate which was 85678. The car was then seized and thereafter the defendant visited the office of the special agent at least twice, attempting to recover the car. The defendant was later indicted for a violation of the Act of October 29, 1919, the National Motor Vehicle Theft Act, for transporting an automobile in interstate commerce "well knowing that the said motor vehicle had been theretofore stolen" and trial was had on June 5, 1922.

Wilfred H. Crabtree, of Boston, Mass., at the trial, identified the car as belonging to him and alleged that on November 10, 1921, he left it on the Street in Boston and that he never saw it again until the day of trial.

E. J. Romano, an auto repairman of many years experience, examined the car on March 16, 1922, at

police headquarters, and testified that the number plate showed no evidence of having been injured or tampered with.

W. E. Worsham, a government witness, testified that there was nothing particularly suspicious looking about the car.

Witnesses having been heard, the defendant was found guilty and sentenced to imprisonment for two years. The defendant, at the close of the government's case, challenged the sufficiency of the evidence to sustain the charge, and the motion was overruled and an exception was allowed. The defendant, at the close of all the evidence, again challenged the sufficiency thereof and moved for a directed verdict of acquittal and was overruled and an exception was allowed. After verdict the defendant moved to set aside the verdict and for a new trial and was overruled and an exception was allowed.





## STATUTE REFERRED TO IN THIS CASE

### SECTION 3, ACT OF OCTOBER 29, 1919

“That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both.” (41 Stat. L. 325.)

## SPECIFICATIONS OF ERROR

Each specification is supported by an assignment, duly presented and filed with the writ of error and will be found on pages 13, 14 and 15 of the transcript of record.

### I

The court erred in refusing to sustain the motion for dismissal made at the close of the government's case.

### II

The court erred in refusing to direct a verdict of not guilty at the close of all the evidence and in al-

lowing the case to go to the jury and in refusing to instruct the jury to acquit the defendant.

### III

The court erred in denying the motion for a new trial and in entering judgment and sentence herein.

## BRIEF OF ARGUMENT

The defendant maintains that this is a conviction depending upon circumstantial evidence and that the testimony produced failed entirely and completely to show that he ever had any knowledge that the car was stolen, even in the event that the proof showed it to be a stolen car.

The defendant maintains that all the testimony is consistent with his innocence and is therefore insufficient to sustain the conviction.

In *Isbell v. United States*, 227 Fed. 788 at 792, in discussing the duty of the court in a circumstantial evidence case upon motion for a directed verdict, the court says:

“It is certain that evidence of facts as consistent with innocence as with guilt is not sufficient to sustain a conviction, and that at the close of every trial

by jury it is the duty of the court upon request to consider and determine whether or not there is any substantial evidence of the guilt of the accused, and, if there is none, to instruct the jury to return a verdict for the defendant. If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt."

In *Kasle v. United States*, 233 Fed. 878 at 887, the court, in discussing the test of the sufficiency of the evidence in a prosecution for receiving stolen goods, says:

"One of the tests was in effect that a person who receives property, which in fact is stolen property, under circumstances which would put a reasonable and honest man upon inquiry, is chargeable with such knowledge in that behalf as would have come to him had he made such reasonable inquiries, touching the source of the property, as would have occurred 'to an honest man of average intelligence.' Another test was that one receiving personal property is chargeable with the particular effect of 'those circumstances attending his reception of the property,' which, in the judgment of the jury, 'should have been deemed by him at the time to be suspicious and suggestive that the title' of the transferor 'was open to question.'

"Plainly such tests as these of guilty knowledge on the part of the accused subjected him to a stand-

ard of conduct and of capacity to detect crime, which the jury might conclude to be the standard of reasonable and honest men of average intelligence when acting under circumstances like those which might be found to have existed here. The effect of such tests was to charge the accused with guilty knowledge or not upon what the jury might find would have induced belief in the mind of a man such as they were told to consider, rather than the belief that was actually created in the mind of the accused; or, at last, the accused might be condemned even if his only faults consisted in being less cautious or suspicious than honest men of average intelligence are of the acts of others. The result of the rule of the charge would be to convict a man, not because guilty, but because stupid."

In *People v. Razezicz*, 206 N. Y. 249, 269, 99 N. E. 557:

"In a criminal case, circumstantial evidence to justify the inference of guilt must exclude to a moral certainty, every other reasonable hypothesis. Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence, or the hypothesis of guilt; nor is it enough that the hypothesis of guilt will account for all the facts proven. Much less does it afford a just ground for conviction that, unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery."

The testimony shows that the defendant was a stranger in Providence and did only what any man

would do. He examined the car and agreed to trade, in the event that he secured a license; the man in possession, living in the premises went with him and helped secure the license; every act of the defendant was the usual and common procedure. The testimony of witness Romano (p. 40 Tr.) and witness Worsham (p. 44 Tr.) shows that there was nothing unusual about the car. The defendant gave his correct name and address in the license application and this certainly demonstrates his good faith. He drove through many cities and made no effort to hide the car; the fact that he visited Nash agencies is proof of good faith; they would be the most likely places where information on a stolen car would be found; it is well known that every agency maintains a list of stolen cars. He again gave his correct name and address when he received the California license and then he furnished all the information he could to the special agent who finally seized the car. True, he can not produce the bill of sale, but in touring the country, it was lost or mislaid; his explanation is ample and it is a fact that hundreds of cars are bought and sold and no evidence of title is preserved; the defendant can not be convicted simply because he is stupid or careless. How many car owners can produce their bill of sale on demand?



Possession of personal property is usually regarded as sufficient evidence of title. The defendant, in purchasing the car and at all times since, acted openly and publicly, without any attempt at concealment and the greatest inference that can be drawn is that there may have been some lack of precaution. But what more could any purchaser do? He paid for it, secured a license and dealt with the man in possession. No ordinary buyer would go further; no ordinary man insists that the engine be disassembled so that the numbers may be compared, and the only way that the car in this case was checked was done in this manner.

If the defendant knew the car was stolen, his natural impulse would have been to change its appearance; the record shows that the same oil can, the same curtains and the same color remained; the marks of identification used by the government were apparent all the time and could readily have been changed, at no expense and without the assistance of any mechanic. If he had had a guilty knowledge, he would have remembered exactly the name and address of the man who sold it to him, for that would have been easy to supply and a thief never has any trouble in producing a bill of sale. The very facts urged by the government against

him are in his favor for the reason that there is nothing unusual about them; he was a stranger in Providence, visited innumerable towns on his trip, and had no reason to perfect a record as he went along. The defendant is a married man, holds a responsible position (Tr. p. 41), and his reputation is good. Every fact in the case points clearly and conclusively to the good faith of the defendant and the government's case is founded entirely on suspicions and inferences and it attempts to convict because of lack of precautions.

It does not appear that the defendant changed the number or ever knew it was changed; the government simply infers that, it having been changed, the defendant did it; not having the bill of sale, and having told the truth about it when first questioned, the government infers there was none and points to it as a circumstance indicating guilty knowledge; the government ignores the perfectly regular conduct of the defendant and whenever two inferences are possible, adopts the one calculated to sustain the conviction.

As said in *State v. Pienick*, 46 Wash. 522 at page 526:

“No man ought to be convicted of a crime upon mere suspicion, or because he may have had an op-

portunity to commit it, or even because of bad character, and where circumstances are relied on for a conviction they ought to be of such a character as to negative every reasonable hypothesis except that of the defendant's guilt. And a new trial should be granted where a conviction is had on evidence not connecting the defendant with the crime beyond reasonable doubt. \* \* \*

"Where a chain of circumstances leads up to and establishes a state of facts inconsistent with any theory other than the guilt of the accused, such evidence is entitled to as much weight as any other kind of evidence, but the chain, as it were, must be unbroken, and the fact and circumstances disclosed and relied upon must be irreconcilable with the innocence of the accused in order to justify his conviction."

An exactly similar case arose in Michigan, *People v. Neilson*, 183 N. W. 707. It appears from the opinion that the defendant purchased a car, previously stolen; he asked the usual questions, made a small down payment, took a bill of sale, paid the balance and drove the car freely about the city. Upon inquiry, he drove the car to the police station and was then arrested for receiving a stolen automobile knowing it to be stolen. Quoting from the opinion:

"A particular point urged by the people, as showing guilty knowledge, is that he changed the appear-

ance of the car. He put on a bumper, painted his initials on the car doors, and fixed an emblem of a fraternal society in the radiator top. We think these acts were innocent, and commonly done by owners of cars. And a discrepancy in the date of the bill of sale is urged. This was not explained. Defendant did not notice it. It might have been due to the fact that the bill was prepared some days before delivery. It might have been an error of the attorney. From this incident, guilty knowledge in this case may not be inferred, nor upon this record can it be inferred, that defendant had knowledge that the number of the car had been changed before he purchased it."

In *Davis v. State*, 193 Pac. (Okla.) 745, at 746, the defendant was convicted of receiving an automobile knowing the same to be stolen. Quoting from the opinion:

"The cross-examination of defendant elicited certain suspicious circumstances showing that, had defendant made a more thorough examination into the ownership of the car, he could have in time discovered, perhaps, that the person who gave his name as Miller was not the true owner of the car. However, the court does not deem the inferences alone arising from lack of precaution to detrmine ownership sufficient by themselves to establish guilty knowledge on defendant's part at the time the car was received by him. In purchasing and taking possession of the car in question, defendant acted openly and publicly, without any attempt at con-



cealment, so far as this record discloses, and there is no fact or circumstance, other than inferences arising from such lack of precaution, shown which in any way directly tends to establish that defendant knew at the time that he was purchasing a stolen car. It is incumbent upon the state to prove every essential element of the crime by evidence beyond a reasonable doubt, and a conviction based upon circumstances which raise merely suspicions of guilt should not be allowed to stand. \* \* \*

“In this case, the inferences properly arising from defendant’s lack of precaution in investigating whether or not the seller was the true owner of the car, considered together with defendant’s conduct immediately after he purchased the car, can not be said to point unerringly and conclusively to the guilt of defendant and to exclude every other reasonable hypothesis than that of guilt; and for such reasons it is the opinion of this court that the state has failed to establish guilty knowledge on the part of defendant by evidence sufficient to sustain the verdict and judgment.”

And to the same effect are:

*Worster v. State*, 90 Southern (Fla.) 188.

*Cohn v. People*, 64 N. E. (Ill.) 306.

16 C. J. 763.

*Roukous v. U. S.*, 195 Fed. 353.

The defendant contends that all the facts and circumstances are consistent with his innocence



and that it is not the intention of the statute to require a purchaser of an automobile to dismantle the same and discover a hidden number. The lower court erred in failing to direct a verdict for the defendant and it is respectfully submitted that the plaintiff in error is entitled to a dismissal or reversal to the end that justice may be done.

Respectfully submitted,

R. J. MEAKIM,

*Attorney for Plaintiff in Error.*

# In the United States Circuit Court of Appeals

For the Ninth Circuit

---

BURRELL JOHNSON,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

---

UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

---

HON. FRANK RUDKIN, *Judge.*

---

BRIEF OF DEFENDANT IN ERROR.

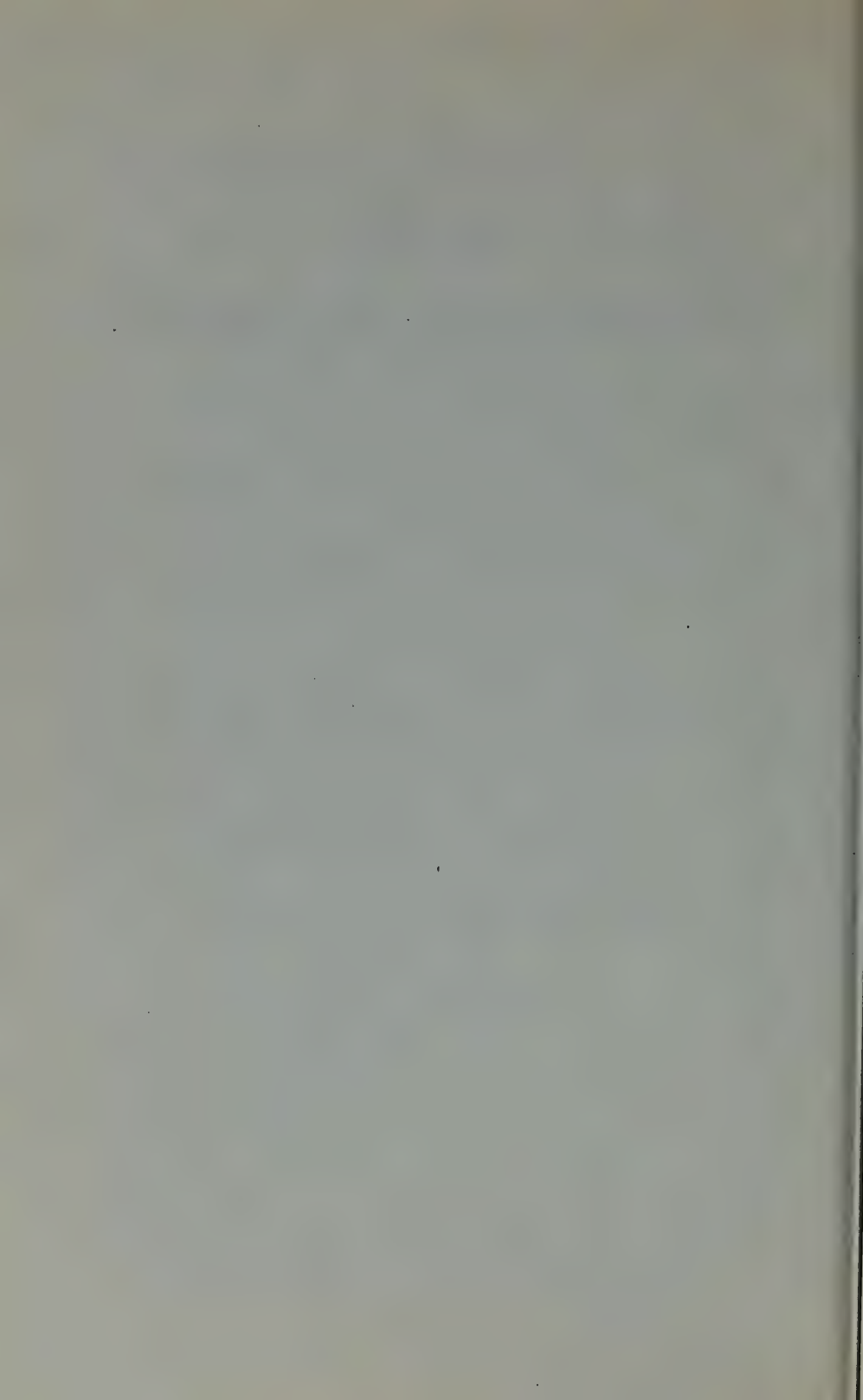
---

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CHARLES P. MORIARTY,  
Special Assistant United States Attorney,  
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Address: 310 Federal Building, Seattle, Wash.

---



**In the United States  
Circuit Court of Appeals**  
**For the Ninth Circuit**

---

BURRELL JOHNSON,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

---

UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

---

HON. FRANK RUDKIN, *Judge.*

---

**BRIEF OF DEFENDANT IN ERROR.**

---

**STATEMENT OF THE CASE**

The defendant, Burrell Johnson, a wholesale newspaper vendor, was convicted for violation of the Dyer Act for transporting a stolen automobile. The facts show that the defendant and his wife arrived in Providence, Rhode Island, in an automobile on November 7, 1921. On November 8th he applied for a license for a Nash car at the State House, and

at that time he gave the number of the car and the engine data to the State official. On November 10, 1921, Dr. Wilfred Crabtree left his car in front of a building in Providence, Rhode Island, and this car was stolen on that afternoon. Dr. Crabtree's car was found in the possession of the defendant in Seattle on February 15, 1922 bearing the numbers of the license applied for on November 8. It was then discovered that the true numbers of the Crabtree car had been removed and other Nash numbers had been placed upon the car. This condition was visible upon inspection of the automobile.

The defendant maintains that he purchased the car, in answer to an advertisement that was placed in the Providence papers on November 7, and that after an inspection of the car traded his Studebaker automobile after removing from it certain personal equipment, and after an examination and inspection of the stolen Nash car. The defendant is a man who, according to his own testimony, has owned ten or twelve used cars and is familiar with the various makes of cars. At the time of the trial he owned three used cars and used them in his business of distributing newspapers.

There is no question in the case that the car was stolen from Dr. Crabtree, and there is no question



that the defendant was found in possession of the stolen car at Seattle, Washington. The defendant does not deny that he transported and removed the car from Providence, Rhode Island, but denies that he had any guilty knowledge of the matter. The evidence presented by the government is substantial, and the rebuttal evidence of the defendant is negative testimony.

### ARGUMENT

It is contended in the brief of the appellant that the facts of this case are entirely consistent with his innocence and that he should not be convicted for stupidity. The Government contends that the facts in the case show a cool and deliberate act of theft, well planned and carefully executed. The Government's operative, Mr. Read, testified at the trial that the defendant at the time of his arrest stated he did not have a bill of sale and did not remember the man from whom he had bought the car, nor did he remember the locality of its purchase in Providence. (Tr. p. 28 and 29). Mr. Worsham, a member of the police force of Seattle, testified that the motor plates when the hood was lifted from the stolen car showed that they had been "jimmied" and the plates taken off

and put on again. This was also testified to by Government witnesses Smith (Tr. p. 33), Worsham (Tr. p. 32), and Read (Tr. p. 29). Mr. Read further testified (Tr. p. 30), that the defendant owned so many cars in the City of Seattle that it was impossible for him to determine when Washington licenses had been issued on particular cars. The defendant himself tells the court that he was familiar with second hand automobiles (Tr. p. 39), and also that at the time he purchased the car he went over and examined the tool equipment and tires, etc. (Tr. p. 36). We have then before this court a man who could very easily because of his experience remove the plates from the machine, transfer them to another machine, and steal a car, or purchase a stolen car, and avoid detection. We have a man familiar with used cars in a strange city, purchasing from a party whom he has never met an automobile without any investigation as to the man's responsibility, or any search as to the title of the machine. We have a man familiar with used cars buying, on sight, unseen, according to his own testimony, an automobile, but we have the controlling and positive evidence of his guilty knowledge in the one mistake the defendant made, and that is his application two days before the theft

for a Rhode Island license upon plates which he had in his possession so that he could cleverly avoid any detection by the Rhode Island authorities. A careful consideration of this one flaw in the defendant's action leads one to believe that the defendant is not only guilty in this instance, but is one who was graduated from the school of crime. If the Rhode Island license had been taken out on a car on November 10th, then upon Dr. Crabtree's report to the Rhode Island authorities a search of the records would have disclosed the sale of a used car to the defendant, and of course would have resulted in his immediate apprehension and the recovery of the car. However, if a license had been issued on a car with the defendant's name plate and number two or three days prior to the theft, then the average police officer would not begin his search in the Rhode Island records for the detection of the crime until after November 10th, because no theft had occurred prior to that time, and there would be no reason for such a search. The defendant could then drive through the various cities, visit different automobile houses without any fear of detection because the number plates on his Nash car would not correspond to the number plates on the stolen car. There is no explanation in this case, and there can

be none, of how the defendant on November 8th purchased a car that was not stolen until two days later. There is no explanation in this case, and there can be none, of how the thief changed these name plates, advertised the car, and sold it, or how the defendant could procure a license in Rhode Island without exciting the suspicion of the police unless the theft had been committed and the license issued prior to the time fixed by the defendant. There is even contradiction in how he come by the money to buy the car (Tr. p. 45). There are no perfect crimes. And there never will be any. Some place or other the law violator will in the conceit of his own cleverness make some false step that will lead the law to his door. In this case it may well be said that while this crime may possess many clever angles, the defendant's one mistake was in applying for his license prior to the date of the theft. It would be unreasonable to suppose that this theft could occur in a staid, old New England city, and an advertisement placed in the paper without the automobile detail in that city making an investigation of all Nash cars advertised for sale. There is nothing in this record to show that the defendant ever made an attempt to procure the newspaper seen by him when he made the purchase, which



would be a very material part of his defense, but he relies upon the vague statement that he saw this advertisement in the newspaper and acted upon it. This case is the usual crime in one particular—and that is the presence of a mystery man, the vendor of the stolen automobile, whose name is not known, whose residence is unknown, and whose evidence of title which he presented to the defendant is missing. Whenever a defendant reaches a stage in his career when he cannot explain how certain things happened, the blame is always placed upon one who is unknown, uncoffined and unsung. There is also another angle to be considered in this case, and that is the application by the defendant for a Rhode Island license upon the purchase of this stolen car. The average motorist is not anxious to spend money for licenses, and if the defendant owned a Studebaker automobile which he was trading for the stolen Nash car, he would have removed his Washington license plates, and in the ordinary course of dealings placed the new license plates on the stolen car in order to relieve himself of further expense. But this defendant is not the average motorist because he is purchasing a stolen car, or has himself stolen the car and must avoid any and all suspicious circumstances. He therefore applies for a license and abandons his Washington license.



## THE VERDICT TESTIFIED

The defendant's brief raises the question of the sufficiency of evidence to justify conviction. The trial judge refused his motion for a directed verdict because it is assumed he believed that the question of the guilt or innocence of the defendant was for the jury. The decisions of the courts are uniform on this subject that the question of the sufficiency of evidence belongs to the jury. The following two cases succinctly state the law:

"Where there is some evidence tending to establish a fact in issue, the jury must judge of its sufficiency. *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639."

"Whether the evidence before a jury does or does not sustain the allegations in a case is a matter wholly within the province of the jury, and if they find in one way, this court cannot review their finding. *Gregg v. Moss*, 14 Wall. 564, 20 L. Ed. 740."

Another case which is point is *Kelly v. United States*, 277 Fed. 408, which states:

"We need not comment upon this evidence. In our judgment it was clearly sufficient to make a case for the jury to determine whether defendant bought and transported the car in question, 'knowing the same to have been stolen,' and the trial court, therefore, did not

err in refusing to direct a verdict in his favor for lack of proof of guilty knowledge.”

*Chass v. United States*, 258 Fed. 914 (C.C.A. 3d Circuit) involved the receipt of stolen goods, which is very similar to transporting a stolen automobile, and in that case there were contradictory statements as in this case and other circumstances, but Judge Haight, speaking for the court said:

“It was unquestionably for the jury to decide whether either of the explanations which he gave was true, and, if neither were, they were certainly justified, in the light of the other circumstances in the case, in reaching the conclusion that he knew or believed that the goods had been stolen when he acquired them.”

And this statement might be well said of this case that if the jury believed that the defendant honestly came by this car after viewing him and hearing his testimony and considering all the other circumstances of the case, it might have acquitted him, but not believing his statements and believing the Government’s witnesses they could find him guilty. It was unquestionably for their decision. See also *Clark v. United States*, 258 Fed. 439. Also *Sobolouski v. U. S.*, 271 Fed. 294. In *Degnan v. United States*, 271 Fed. at pages 292 and 293 it was said:

"It is true that the essence of the crime whereof this plaintiff in error was charged is guilty knowledge, and that such knowledge must be brought home to the accused by competent, though perhaps circumstantial evidence."

This case also announces a rule which is the fixed rule of the court when it said:

"By assignments of error, we are asked to review the weight of evidence—something so plainly beyond the power of an appellate court of the United States in a criminal cause, or in an action at common law, that citation has long been superfluous."

*Cuomo v. United States*, 231 Fed. 117;  
*Soblowski v. United States*, 271 Fed. 294.

There is also another phase of the case to be considered, and that is the recent possession of a stolen car which, while not conclusive, is very damaging evidence, as was said in *Rosen et al v. United States*, 271 Fed. 655:

"The possession of stolen property, standing alone, does not establish guilt. But the possession of property recently stolen raises a presumption of guilt which in the absence of explanation may authorize a jury to inter a criminal connection with its acquisition. *Wilson v. United States*, 162 U. S. 613, 620, 16 Sup. Ct. 895, 40 Law. Ed. 1090; *People v. Weldon*, 111 N.Y. 569, 576, 19 N.E. 279."

And also in

*Wilson v. United States*, 162 U. S. 1095, 40  
L. Ed. 1090:

“Possession of the fruits of crime recently after its commission justified the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.”

See also

*Le Fanti v. United States*, 259 Fed. 464.

The case of *Peterson v. United States*, 213 Fed. 922, involved receipt of stolen cattle, and it was said:

“It is not required that he should see the thief taking the property, or that the thief should have told him he stole the property. Knowledge may be inferred from circumstances. Anything amounting to notice, whether such notice be direct or indirect, positive or inferential, will satisfy the statute.”

See also

*Pounds v. United States*, 265 Fed. 245;  
*Cohen v. United States*, 277 Fed. 771;  
*Kelly v. United States*, 277 Fed. 405;  
*Katz v. United States*, 281 Fed. 129.

In conclusion the government respectfully contends that a clever and deliberate law evader has

been brought before the court, fairly tried, and convicted. Every criminal prosecution involving the receipt of stolen property rests largely upon circumstantial evidence. When the circumstances lend themselves to the innocence of the defendant or to the guilt of the defendant, as the jury may believe the various witnesses, then it is within their province to decide. There is nothing unusual in the case of the defendant's denial of guilty knowledge. All defendants who stand trial deny their connection with crime. But this defendant has not shown how he came by this car by any other evidence than his own testimony. He has not clearly shown how he came by the money to purchase the car, and the defendant's own statements to the Government's investigator and the police officers of the City of Seattle show, circumstantially it may be admitted, but definitely, that the defendant had knowledge of a theft. No man schooled as the defendant was in the use of second hand automobiles could have purchased a car that bore upon its face the marks of crime. Circumstances when they are unexplainable are more reliable than the living words of witnesses because they do not rest upon the tender mercy of memory. In this case the defendant in error is looking to submit its theory upon

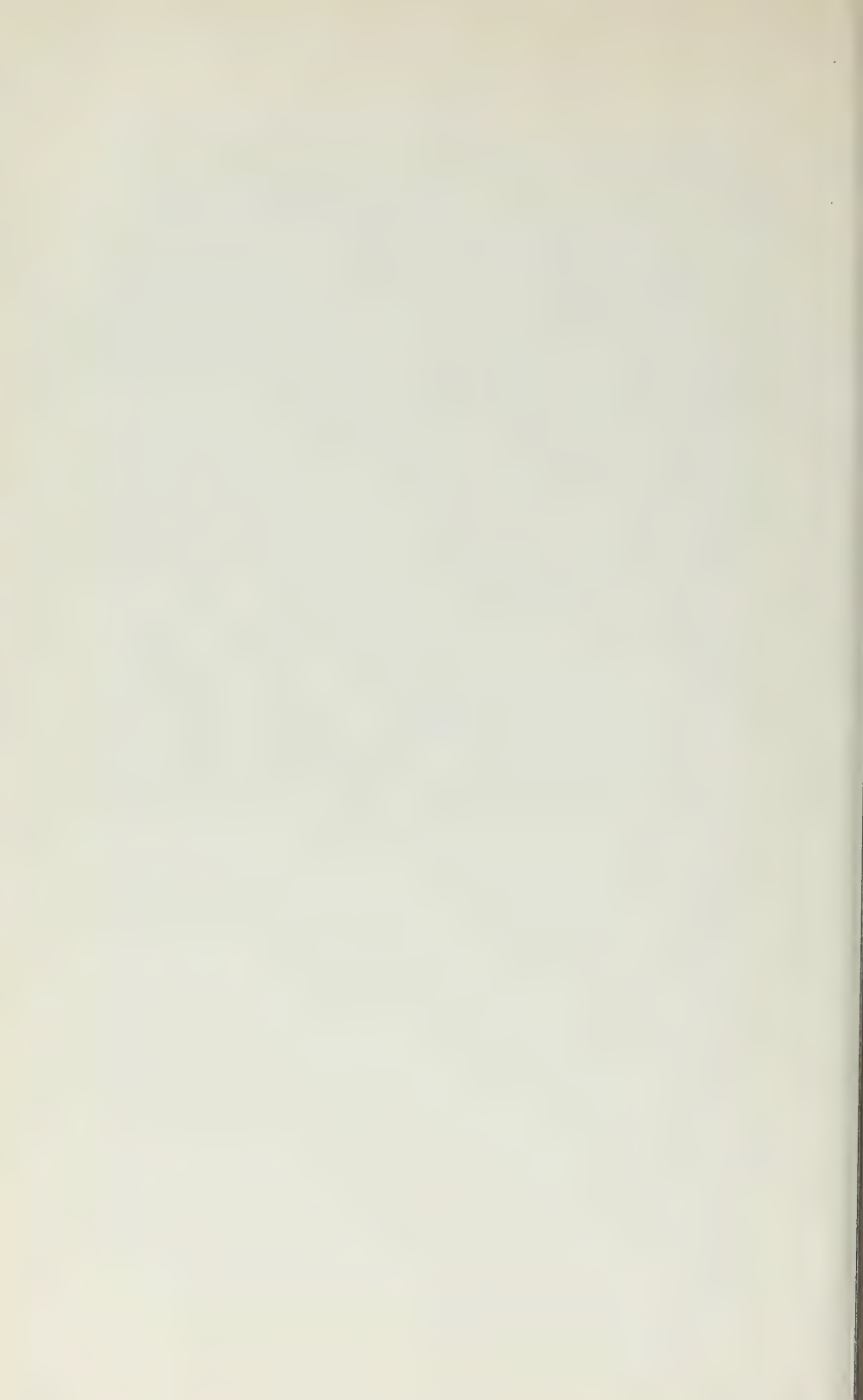


the unexplained and unexplainable action of the defendant in procuring the license two days before the theft of the car. This circumstance alone would be sufficient for the trial court to refuse to sustain any motion for dismissal or directed verdict made by the defendant, and also justify a jury in coming to the conclusion of the defendant's guilt. The conviction should stand on the record and the finding of the jury.

Respectfully submitted,

THOS. P. REVELLE,  
United States Attorney,

CHARLES P. MORIARTY,  
Special Assistant United States Attorney,  
*Attorneys for Defendant in Error.*



No. 3932

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IN THE  
**United States Circuit Court  
of Appeals**

For the Ninth Circuit

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UNITED STATES OF AMERICA,  
Plaintiff, Appellant,

VS.

JOSEPH WOERNDLE,  
Defendant, Respondent.

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**Transcript of Record**

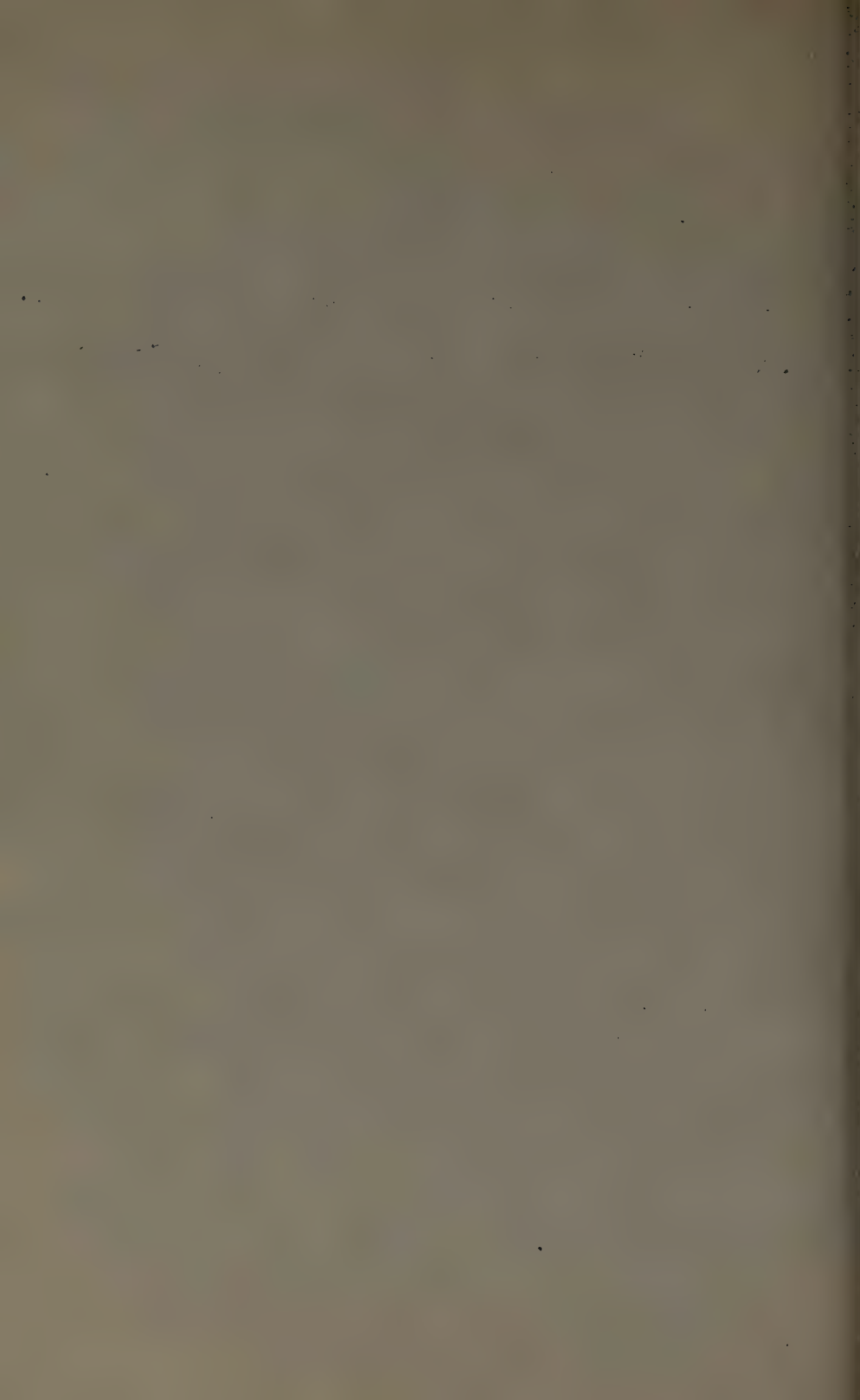
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Upon Appeal from the United States District Court  
for the District of Oregon.

---

MR. LESTER W. HUMPHREYS,  
United States Attorney, District of Oregon, Port-  
land, Oregon,  
For Appellant.

MR. C. T. HAAS, Exchange Bldg., Portland, Oregon,  
For Respondent.



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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

MR. LESTER W. HUMPHREYS, United States Attorney,  
District of Oregon, Portland, Oregon.

For Appellant.

MR. C. T. HAAS, Exchange Bldg., Portland, Oregon.

For Respondent.

No. ....

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IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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UNITED STATES OF AMERICA,  
Plaintiff, Appellant,

vs.

JOSEPH WOERNDLE,  
Defendant, Respondent.

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## Transcript of Record

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Upon Appeal from the United States District Court  
for the District of Oregon.

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MR. LESTER W. HUMPHREYS,  
United States Attorney, District of Oregon, Port-  
land, Oregon,

For Appellant.

MR. C. T. HAAS, Exchange Bldg., Portland, Oregon,  
For Respondent.

---



**CITATION ON APPEAL**

UNITED STATES OF AMERICA: ss.

TO JOSEPH WOERNDLE: GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Ninth Circuit, to be held at San Francisco, California, on the 19th day of October, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the District of Oregon, wherein the United States of America is appellant and Joseph Woerndle is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said District of Oregon, this 19th day of September, 1922.

R. S. BEAN,  
District Judge.

On the 19th day of September, 1922, there was duly filed in the District Court of the United States for the District of Oregon a notice of appeal and assignments of error, in words and figures as follows, to-wit:

**NOTICE OF APPEAL**

The above named plaintiff, United States of America, hereby appeals to the Circuit Court of Appeals,

Ninth Circuit, from the decree entered on April 17, 1922, in the above entitled court and cause, dismissing the bill of complaint of plaintiff; and plaintiff prays that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which the aforesaid decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals, Ninth Circuit.

LESTER W. HUMPHREYS,

United States Attorney.

Portland, Oregon, September 19, 1922.

And now, to-wit: on September 19, 1922, IT IS ORDERED that the appeal be allowed as prayed for.

R. S. BEAN,

District Judge.

### ASSIGNMENTS OF ERROR ON APPEAL

Comes now the above named plaintiff and appellant and in connection with the appeal in the above entitled cause, makes the following assignments of error, which it avers occurred in said cause.

#### I.

The court erred in holding that a passport fraud, deliberately perpetrated upon the United States by the naturalized German, Woerndle, then in the employ of the Austrian Consular Service, in October, 1914, by which he aided a German Reserve officer, then in the



United States, to assume the identity and citizenship of Woerndle, and return through belligerent territory under fraudulent protection of American citizenship, to enter the German Military service; together with letters written by Woerndle when it appeared to him that the United States was about to enter the war, saying he was ashamed of the action of the American nation, that if he were in Germany he would gladly allow himself to be put in uniform and would be found in the trenches or on the battlefield, dead, with other similar expressions, and with the other evidence in the case, did not show that Woerndle had not honestly renounced allegiance to Germany; this having been his first opportunity after his naturalization to exhibit by word or act, his true allegiance.

## II.

The court erred in holding that Woerndle had been loyal to the United States after February, 1917; the evidence disclosing that the passport fraud was discovered then, but Woerndle's part in it still unknown, that the Government then began an investigation, and that Woerndle, on learning of the investigation, became fearful and concealed evidence of his part in it, by cutting an incriminating page out of his diary, and pasting a rewritten expurgated page in its place.

## III.

The court erred in failing to hold that when Woern-

dle, a lawyer, admitted in 1909, the sole representative at Portland of the Austrian Consulate, the editor of a newspaper published in German in Portland, did the things set out in specifications I and II, his acts were inspired by an allegiance to Germany superior to his allegiance to the United States.

#### IV.

The court erred in holding that the evidence outlined in Specifications I, II and III was insufficient to support plaintiff's bill of complaint.

#### V.

The court erred in dismissing plaintiff's bill of complaint.

#### VI.

The court erred in failing to decree the cancellation of Woerndle's citizenship.

LESTER W. HUMPHREYS,

United States Attorney.

On the 1st day of April, 1921, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint in words and figures as follows, to-wit:

### **BILL OF COMPLAINT IN EQUITY**

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON:

United States of America by Lester W. Humphreys, United States Attorney for the District of Oregon, pursuant to authority conferred upon him by the laws of the United States, brings this its bill of complaint against the above named defendant and for cause of suit complains and alleges:

I.

That the defendant Joseph Woerndle now resides at Portland, State of Oregon, and within the jurisdiction of this court, and since on or about the 23rd day of August, 1904, has been a citizen of the United States by reason of certain hereinafter described proceedings in naturalization.

II.

That the Superior Court of the State of Washington, for Pacific County, is a court having jurisdiction to naturalize aliens in the said State of Washington for the county aforesaid, in which the naturalized citizen, to-wit: Joseph Woerndle, resided on August 23, 1904, and had so resided for some time prior thereto.

III.

That on or about the 23rd day of August, 1904, Joseph Woerndle, the defendant above named, was then and there an alien and subject of a foreign state and sovereign, to-wit: a person who was born within the territorial limits of the Imperial Government of Germany and was a subject of the Emperor of Ger-

many and was admitted to become a citizen of the United States by a court then and there having jurisdiction of naturalization matters, to-wit: the Superior Court of the State of Washington for Pacific County, holding session at the City of South Bend, in said county and state, and a certificate of naturalization was on said 23rd day of August, 1904, issued and delivered to the said defendant under and by virtue of the order of the said Superior Court of the State of Washington for Pacific County, made and entered on or about the 23rd day of August, 1904, and ever since said date said defendant has claimed and now claims to be a citizen of the United States by reason thereof.

#### IV.

That the said certificate of naturalization, issued and delivered to said defendant as described in paragraph three hereof, was procured from the said Superior Court of the State of Washington for Pacific County by fraud and deception of him, the said Joseph Woerndle; that said fraud and deception upon the said Superior Court of the State of Washington for Pacific County by the said defendant in securing the issuance and delivery of the said certificate of naturalization, consisted in false representations and concealment of material facts and the making of a false oath of allegiance, without which fraud and deception the judgment admitting said defendant to citizenship would

not have been rendered and the certificate of naturalization would not have been issued, which fraud and deception occurred in the following manner, to-wit:

That prior to the 23rd day of August, 1904, said defendant declared on oath before a court having jurisdiction over naturalization proceedings, that it was his bona fide intention to become a citizen of the United States and renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty and particularly to the Emperor of Germany, of whom he was theretofore a subject; that said declaration, so made on oath by defendant, was false and untrue; that in truth and in fact it was not the intention of the said defendant to renounce absolutely and forever, or at all, his allegiance to William II, Emperor of Germany, but in truth and in fact said defendant has at all times and does now retain his allegiance to the State of Germany and to the Emperor thereof. That said defendant did on the 25th day of August, 1904, ever since has and does now retain and hold allegiance to the State of Germany, superior to that which he recognizes to the United States of America. That said defendant, on or about the 23rd day of August, 1904, as a part of the aforesaid naturalization proceedings, declared on oath before the Superior Court of the State of Washington for Pacific County, that he would support the Constitution of the United States and that he absolutely and



entirely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, and particularly to William II, Emperor of Germany, of whom he was before a subject. That the aforesaid oath, so made by the defendant before said Superior Court of the State of Washington for Pacific County, was fraudulent and untrue in this, that the said defendant made said oath with a mental reservation of allegiance to said William II, Emperor of Germany, and to the State of Germany, and that the said allegiance, so reserved by the defendant aforesaid, was and is superior to the allegiance held by the said defendant to the United States of America.

#### V.

That before the filing of this Bill of Complaint, there has been delivered to and is now in the possession of the said United States Attorney an affidavit made and delivered by V. W. Tomlinson, Naturalization Examiner of the Bureau of Naturalization, Department of Labor of the United States, showing good cause for instituting this proceeding, copy of which affidavit is hereto attached and incorporated herein and is by this particular reference made a part of this Bill of Complaint as Exhibit "A".

#### VI.

That plaintiff has no plain, speedy and adequate remedy at law, but only in this court of equity having jurisdiction therein.

WHEREFORE plaintiff prays:

1. That process issue out of this court in accordance with the law relating to naturalization proceedings and the rules and practices of this court requiring the defendant herein to be and appear in the above entitled court on a day certain, to-wit: sixty (60) days after the date of service thereof.

2. That said defendant be required to answer this Bill of Complaint, or have judgment for cancellation of said certificate of naturalization taken pro confesso.

3. That the order of the Superior Court of the State of Washington for Pacific County, made on the said 23rd day of August, 1904, admitting the defendant herein to be a citizen of the United States of America, be vacated and set aside.

4. That the certificate of citizenship issued out of the Superior Court of the State of Washington for Pacific County and delivered to the said Joseph Woerndle, be revoked and cancelled.

5. That said defendant, Joseph Woerndle, be caused to refrain and be enjoined from ever after using or enjoying any of the rights, privileges and benefits thereunder, and

6. That plaintiff herein have such other, further and different relief as the nature of this case may require,

or as to this court may seem meet and just in equity.

LESTER W. HUMPHREYS,

United States Attorney, Solicitor for Plaintiff.

EXHIBIT "A"

UNITED STATES OF AMERICA,

DISTRICT OF OREGON, ss.

I. V. W. Tomlinson, being first duly sworn on oath, say: That I am a duly appointed and acting naturalization Examiner of the Bureau of Naturalization, United States Department of Labor, and having my official headquarters at the City of Portland, County of Multnomah, State of Oregon. That as such Examiner I am familiar with and have access to the records of the United States Naturalization Service and all courts exercising naturalization jurisdiction.

That on or about August 23, 1904, the Superior Court of the State of Washington, for Pacific County at South Bend, Washington, was a court by law vested with naturalization jurisdiction, and with power thereunder to admit to citizenship, as citizens of the United States aliens applying therefor, and who had complied with the laws, rules and regulations with respect thereto. That the records of said Superior Court at South Bend, Washington, show that on or about August 23, 1904, one Joseph Woerndle, a native of Germany and a subject of the German Empire and its rulers was admitted in said court to full citizenship in, and as a citi-

zen of the United States of America. That prior to being so admitted to citizenship in said court, and as a necessary precedent thereto said Joseph Woerndle, in open court, declared upon his oath that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign Prince, Potentate, State or Sovereignty, whatsoever, and particularly to the Emperor of Germany, of whom he was then a subject. That he further in open court at said time declared upon his oath in the prescribed form that he would support the Constitution and laws of the United States.

That on or about October 3, 1914, and for long prior thereto, one Hans W. Boehm, a citizen of the German Empire and a subject of its rulers, was a resident and inhabitant of Multnomah County, State of Oregon. That said Boehm was a Reserve or other officer of the German Army whose exact official connection with such army at such time is unknown to this affiant. That on October 3, 1914, and for some time prior thereto a state of war existed between the Imperial German Government, allied with the Imperial and Royal Austro-Hungarian Government, and the Republic of France allied with the Kingdom of Great Britain and Ireland, the Kingdom of Belgium and the Imperial Government of Russia. That this affiant has ascertained from an inspection of the official files and documents of the United States Department of Justice that on or about October 3, 1914, said Joseph

Woerndle, then a resident and inhabitant of Multnomah County, State of Oregon, addressed, in writing, the Secretary of State of the U. S. Department of State, at Washington, D. C., in substantially the following form and manner, to-wit:

“Portland, Oregon, Oct. 3, 1914.

“His Excellency

Wm. J. Bryan,

Secretary of State,

Washington, D. C.

Dear Sir:

Enclosed find application for passport and certificate of citizenship, together with the sum of \$2.00, and would kindly request that the same be sent to Joseph Woerndle, c/o Waldorf-Astoria Hotel, New York, N. Y.

Submitting my sincere respects, I am, believe me,

Your obedient servant,

(Sgd.) JOSEPH WOERNDLE.”

That said Joseph Woerndle transmitted to the Secretary of State with said letter an application for a passport signed by him, the said Joseph Woerndle, together with the citizenship papers of him, the said Joseph Woerndle. That thereafter and on or about October 9, 1914, a passport was duly and regularly issued to Joseph Woerndle by the proper officers of



the Department of State and was forwarded by them as requested to said Joseph Woerndle, care of Waldorf-Astoria Hotel, New York City, N. Y. That said passport so issued and delivered, as aforesaid, was thereafter called for and secured by a person purporting to be Joseph Woerndle, but, who in truth and in fact was not Joseph Woerndle, but was in fact the said Hans W. Boehm who took and assumed the name of Joseph Woerndle; used said passport issued to Joseph Woerndle to enable him, the said Hans W. Boehm, to travel in safety from New York, N. Y., to Berlin, Germany, and used the citizenship papers of said Joseph Woerndle as identification to enable him, the said Hans W. Boehm, to so travel upon said passport as an American citizen when in truth and in fact he was not an American citizen, but was an intelligence or other officer of the Germany Army. That thereafter the said Hans W. Boehm using the alias of "Joseph Woerndle," and the citizenship papers of Joseph Woerndle, and by virtue of such alias and citizenship papers purporting to be an American citizen, and moving about and traveling unhindered as an American citizen, and under the protection of the Government of the United States by virtue of such falsely assumed citizenship, returned from Berlin, Germany, to the City of New York, N. Y., on a date unknown to this affiant, but which affiant is informed and believes, wherefore he alleges, the fact to be, was not later than January 1, 1915.

That thereafter and on or about January 3, 1915, the German Foreign Office at Berlin, Germany, cabled the Ambassador of the Imperial German Government, at Washington, D. C., in words and figures substantially as follows:

“Jan. 3-15. Secret. General Staff desires energetic action in regard to proposed destruction of Canadian Pacific Railway at several points, with a view to complete and protracted interruption of traffic. Capt. Boehm, who is known on your side and is shortly returning, has been given instructions. Inform the Military Attache and provide the necessary funds.

ZIMMERMAN.”

That the “General Staff” referred to in said telegram was the General Staff of the German Army, and the “ZIMMERMAN” whose name was signed to said message was Cancellor of the Imperial German Government, and the “Capt. Boehm,” referred to in said message was said Hans W. Boehm, alias Joseph Woerndle, as aforesaid.

That shortly after the receipt of said cable, aforesaid, said Hans W. Boehm received from VonPapen, an accredited agent of the Imperial German Government, the sum of \$50,000.00 “for special purposes,” which said sum was deposited by said Hans W. Boehm with the Guaranty Trust Company, New York, N. Y.,

under the name of "Woerndle & Hanson," c/o "Hagemeyer & Brunn, 9 Stone Street, New York, N. Y." The signature card used in making said deposit, showing "Joseph Woerndle" as the legitimate person to draw against said account so established.

That thereafter the said Hans W. Boehm, using the alias, "Joseph Woerndle," applied for and received other passports from the Department of State of the United States, supporting the applications therefor with the citizenship papers of Joseph Woerndle and representing himself to be an American citizen, and in fact to be "Joseph Woerndle," and by virtue of which passports he traveled safely in various European countries then at war with the Imperial German Government and the Royal and Imperial Austro-Hungarian Government, in which said countries he could not have traveled under his true name or citizenship without arrest and incarceration as a prisoner of war. That during all of said times from October 3, 1914, and thereafter, said Hans W. Boehm, alias "Joseph Woerndle," was acting as an agent of the Imperial German Government in promoting its interests and its warfare against countries with which the United States as a Nation was at peace, but with which the Imperial German Government and Royal and Imperial Austro-Hungarian Government was at war.

That the said Joseph Woerndle openly and actively

aided and assisted the said Hans W. Boehm to secure the passports heretofore herein referred to, and openly and actively aided and assisted said Hans W. Boehm in furthering the interests and warfare of the Imperial German Government and Royal and Imperial Austro-Hungarian Government, and advised, aided and assisted said Hans W. Boehm to use the alias of "Joseph Woerndle," for the purpose of securing fraudulent passports and perpetrating frauds upon the Government of the United States in securing its protection abroad for one not a citizen thereof, and well known to said Joseph Woerndle to be not entitled to such protection, and thereby perpetrating frauds upon other nations and countries with which the United States was at peace, but with which the Imperial German Government and its allies were at war.

That the said Joseph Woerndle fraudulently obtained naturalization in this:

That at the time he declared upon his oath in open court that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign Prince, Potentate, State and Sovereignty, and particularly to the Emperor of Germany, of whom he was then a subject, in truth and in fact he did not renounce or abjure allegiance to the German Emperor, but secretly and unknown to the court admitting him to citizenship, and for the purpose of deceiving and mis-

leading said court, he kept and retained allegiance to the Empire of Germany and its rulers as evidenced by the fact that he has used the citizenship bestowed upon him by said court at said time for the purpose of:

(1) Aiding and assisting said Imperial German Government and its rulers in making war upon nations with which the United States was at peace; and

(2) Advising a person whom he knew not to be a citizen of the United States to pose as a citizen thereof, and to claim citizenship therein, and to seek for and obtain fraudulent rights belonging only to a citizen, and aiding and assisting and encouraging the perpetration of such fraud by furnishing his own citizenship papers in furtherance thereof.

V. W. TOMLINSON.

Subscribed and sworn to before me this 5th day of March, 1921.

G. H. MARSH,

Clerk U. S. District Court, Portland, Oregon.

(Seal)

By E. M. MORTON,

Deputy Clerk.

AND AFTERWARDS, to-wit, on the 26th day of September, 1921, there was filed in said District Court, a motion in words and figures as follows, to-wit:



**MOTION TO STRIKE PORTIONS OF BILL OF  
COMPLAINT IN EQUITY**

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON:

The defendant acting by his undersigned attorneys respectfully moves for an order of this court striking out from the Bill of Complaint the portions thereof hereinafter designated.

This motion is filed in good faith and not for the purpose of delay and is meritorious and is made because the allegations sought to be stricken out are incompetent, irrelevant, immaterial, sham, frivolous and are not pertinent and are conclusions of law.

The portions sought to be stricken out of the Bill of Complaint and out of the affidavit attached to the Bill of Complaint as Exhibit "A" insofar as the same are incorporated in the complaint, are as follows, namely:

1. But in truth and in fact said defendant has at all times and does now retain his allegiance to the State of Germany and to the Emperor thereof. (Complaint, page 3.)

2. The following words in paragraph 4 on page 3 of the Complaint: "ever since has and does now."

3. That said Boehm was a Reserve or other officer of the German Army whose exact official

connection with such Army at such time is unknown to this affiant. (Affidavit, page 1.)

4. That on October 3, 1915, and for some time prior thereto a state of war existed between the Imperial German Government, allied with the Imperial and Royal Austro-Hungarian Government, and the Republic of France allied with the Kingdom of Great Britain and Ireland, the Kingdom of Belgium and the Imperial Government of Russia. (Affidavit, page 1.)

5. That said passport so issued and delivered, as aforesaid, was thereafter called for and secured by a person purporting to be Joseph Woerndle, but, who in truth and in fact was not Joseph Woerndle, but was in fact the said Hans W. Boehm who took and assumed the name of Joseph Woerndle; used said passport issued to Joseph Woerndle to enable him, the said Hans W. Boehm, to travel in safety from New York, N. Y., to Berlin, Germany, and used the citizenship papers of said Joseph Woerndle as identification to enable him, the said Hans W. Boehm, to so travel upon said passport as an American citizen when in truth and in fact he was not an American citizen, but was an intelligence or other officer of the German Army. (Affidavit, page 2.)

6. That thereafter the said Hans W. Boehm using the alias of "Joseph Woerndle," and the

citizenship papers of Joseph Woerndle, and by virtue of such alias and citizenship papers purporting to be an American citizen, and moving about and traveling unhindered as an American citizen, and under the protection of the Government of the United States by virtue of such falsely assumed citizenship, returned from Berlin, Germany, to the City of New York, N. Y., on a date unknown to this affiant, but which affiant is informed and believes, wherefore he alleges, the fact to be, was not later than January 1, 1915. (Affidavit, page 2.)

7. That thereafter and on or about January 3, 1915, the German Foreign Office at Berlin, Germany, cabled the Ambassador of the Imperial German Government, at Washington, D. C., in words and figures substantially as follows:

"Jan. 3-15. Secret. General Staff desires energetic action in regard to proposed destruction of Canadian Pacific Railway at several points, with a view to complete and protracted interruption of traffic. Capt. Boehm, who is known on your side and is shortly returning, has been given instructions. Inform the Military Attache and provide the necessary funds.

"ZIMMERMAN."

(Affidavit, page 2.)

8. That the "General Staff" referred to in said

telegram was the General Staff of the German Army, and the "ZIMMERMAN" whose name was signed to said message was Chancellor of the Imperial German Government, and the "Capt. Boehm," referred to in said message was said Hans W. Boehm, alias Joseph Woerndle, as aforesaid. (Affidavit, page 2.)

9. All of the first paragraph at the top of page three of the affidavit.

10. All of the second paragraph on page three of the affidavit.

11. The following words set out in paragraph 3 of the affidavit, page 3, "and openly and actively aided and assisted the said Hans W. Boehm in furthering the interests and warfare of the Imperial German Government and the Royal and Imperial Austro-Hungarian Government," "and thereby perpetrating frauds upon other nations and countries with which the United States was at peace, but with which the Imperial German Government and its allies were at war."

12. All of the last paragraph on page three of the affidavit.

(Sgd.) W. P. LA ROCHE,

C. T. HAAS,

Attorneys for the Defendant.

AND AFTERWARDS, to-wit, on the 10th day of October, 1921, an order was made in said cause, as

follows:

**ORDER PARTIALLY ALLOWING MOTION TO  
STRIKE**

Now, at this day, this cause comes on to be heard upon the motion of defendant on file herein to strike out parts of the bill of complaint, plaintiff appearing by Mr. John C. Veatch, Assistant United States Attorney, and defendant by Mr. W. P. La Roche and Mr. Charles T. Haas, of counsel. And the court, having heard the arguments of counsel,

IT IS ORDERED that said motion be and the same is hereby allowed so as to strike from the complaint herein that part of paragraph V as follows: "and incorporated herein and is by this particular reference made a part of this complaint."

AND AFTERWARDS, to-wit, on the 1st day of November, 1921, there was duly filed in said court and cause a motion as follows:

**MOTION TO DISMISS BILL OF COMPLAINT**

To the Honorable Judges of the District Court of the United States for the District of Oregon:

The defendant, acting by his undersigned attorneys, respectfully moves for an order of this court dismissing the bill of complaint in this cause for the reasons and upon the following grounds:

**1.**

That it appears on the face of the bill of complaint



that the facts alleged therein do not constitute a cause of suit or entitle the plaintiff to the relief therein prayed for.

## 2.

Because the cause of suit as alleged in the said bill of complaint has not accrued within five years next preceding the filing of the complaint as required by law, and it so appears from the face of the bill of complaint.

That said bill of complaint was not filed in the said court within the statutory period required by law and it so appears from the face of the bill of complaint.

## 4.

That the affidavit of V. W. Tomlinson, Naturalization Officer, attached to said bill of complaint, and upon which affidavit Lester W. Humphreys, United States District Attorney for the District of Oregon, instituted this proceeding by the filing of said bill of complaint in this court, does not show good cause therefor as required by law but on the contrary, the facts in said affidavit set forth show that there is no legal ground for the institution of this proceeding.

W. P. LA ROCHE,  
C. T. HAAS,  
Attorneys for Defendant.

AND AFTERWARDS, to-wit, on the 21st day of November, 1921, an order was duly made in said court and cause as follows:

**ORDER DENYING MOTION TO DISMISS BILL**

This cause was heard by the court upon the motion of the defendant to dismiss the bill of complaint herein and was argued by Mr. Lester W. Humphreys, United States Attorney, and by Mr. William P. La Roche and Mr. C. T. Haas of counsel for said defendant. On consideration whereof

IT IS NOW ORDERED AND ADJUDGED that said motion be and the same is hereby denied.

AND AFTERWARDS, to-wit, on the 28th day of November, 1921, there was duly filed in said court and cause an answer as follows:

**ANSWER**

Comes now the defendant, Joseph Woerndle, and for answer to the complaint herein, alleges, admits and denies:

**I.**

Admits the allegations contained in paragraphs I and II of the said bill of complaint in equity.

**II.**

Denies that he was a subject of the Emperor of Germany on the 23rd day of August, 1904, as alleged in the third paragraph of the said bill, but alleges the fact to be that prior to the 23rd day of August, 1904, to-wit, on the 19th day of June, 1897, he made application for and received a certificate of surrender of citizenship from the Royal Bavarian Government of

Upper Bavaria of the Empire of Germany, which said act was done by him, the said defendant, for the sole purpose of expatriating himself from his native land so that he could be fully prepared, upon entering the United States, for citizenship in the United States of North America. Defendant admits all of the other allegations contained in said paragraph III.

### III.

Defendant denies that the said certificate of naturalization issued and delivered to the said defendant, as described in paragraph III of said bill herein, from the said Superior Court of the State of Washington, for Pacific County, was procured by fraud and deception by him and denies that he made any false representations and/or concealed any material facts and/or made a false oath of allegiance in said Superior Court of the State of Washington, for Pacific County, from which, or either or any of them, said certificate was procured and issued. Defendant denies that in truth and fact it was not the intention of him, the said defendant, to renounce absolutely and forever, or at all, his allegiance to William the Second, Emperor of Germany; denies that in truth and in fact said defendant has at all times and does now retain his allegiance to the State of Germany and the Emperor thereof. Said defendant denies that he did on the 24th day of August, 1904, ever since, and does now, or that at any time on or subsequent to the 24th day of August, 1904, retain and hold

any allegiance to the State of Germany or to any foreign prince, potentate, state or sovereignty, and particularly to William the Second, Emperor of Germany, superior to that which he recognizes to the United States of America. Said defendant denies that the oath which he took prior to the 23rd day of August, 1904, as a part of the aforesaid naturalization proceedings, that he would support the Constitution of the United States and that he absolutely and entirely renounced and adjured all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to William the Second, Emperor of Germany, was fraudulent and untrue in that said defendant made said oath with the mental reservation of allegiance to the said William the Second, Emperor of Germany, and to the State of Germany, and that the said allegiance so reserved by the defendant aforesaid was and is superior to the allegiance held by the said defendant to the United States of America. Defendant alleges that on the 23rd day of August, 1904, he did declare on oath in the Superior Court of the State of Washington, for Pacific County, said court having jurisdiction over naturalization proceedings, that it was his bona fide intention to become a citizen of the United States and renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to the Emperor of Germany, of whom he had been a subject, and that said declara-

tion so made on oath was absolutely true without any mental reservations whatsoever; and defendant further alleges that on the 23rd day of August, 1904, in the same court, as a part of the aforesaid naturalization proceedings, he did declare on oath that he would support the Constitution of the United States and that he absolutely and entirely renounced and adjured all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to William the Second, Emperor of Germany, of whom he had been a subject, and that therefore said oath was true and that there was no mental reservation whatever through or by which he withheld any allegiance for his native state or sovereignty, but all of his allegiance was wholeheartedly then and there given the United States of America without any mental reservation.

#### IV.

The defendant admits that before the filing of this bill of complaint there had been delivered to and is now in the possession of the United States Attorney, an affidavit made and delivered by V. W. Tomlinson, naturalization examiner of the Bureau of Naturalization, Department of Labor of the United States, copy of which affidavit is attached to said bill of complaint, and defendant denies that said affidavit shows good cause for instituting the proceedings set out in the bill of complaint, but alleges the fact to be that the said affidavit is wholly insufficient in its statements to



authorize Lester W. Humphreys, United States Attorney for the District of Oregon, to bring and institute said bill of complaint for the cancellation of defendant's citizenship.

And defendant further answering alleges:

### I.

That it appears on the face of the complaint that the Government had knowledge of the alleged fraud complained of in the said bill of complaint, for more than five years before the filing of the said bill of complaint, and that the said suit is therefore barred by the statute of limitations.

### II.

That it appears on the face of the bill of complaint that the facts alleged therein do not constitute a cause of suit or entitle the plaintiff to the relief therein prayed for.

W. P. LA ROCHE,

C. T. HAAS,

Solicitors for Defendant.

WHEREFORE, defendant having fully answered, prays that said bill of complaint be dismissed.

And afterwards, to-wit, on the 30th day of November, 1921, there was duly filed in said court and cause a motion as follows:

**MOTION TO RETURN PRIVATE PAPERS, BOOKS  
AND OTHER PROPERTY**

TO THE HONORABLE JUDGES OF THE DIS-  
TRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON:

Now comes the defendant above named and respectfully moves the court and alleges as follows:

Defendant states that he is a citizen of the United States and a resident of Portland, Oregon, that he resides, owns and occupies a home at 710 Flanders Street in said city.

That on the 28th day of December, 1918, while your petitioner was absent at his daily vocation, certain officers of the United States Government whose names to the petitioner are unknown, unlawfully and without proper warrant or authority so to do, entered the petitioner's home and seized all of his books, letters, papers, notes, diaries, legal instruments, and other personal property in said home which petitioner is now unable to describe, and this in violation of the fourth and fifth Amendment to the Constitution of the United States and also in violation of the Act of June 15th, 1917, Chapter 30, Title 11, Sections 1-23 thereof, 40 Stat. 217-228, United States Laws, also known as Chapter 16 of Barnes Federal Code, being paragraphs 10050-10069 inclusive.

That said forcible seizing and taking of papers and

other personal property from the premises of your petitioner was under the color of a purported and alleged search warrant based on an alleged affidavit of W. R. Bryon, a United States official, said warrant being issued by the Hon. Frederick H. Drake, United States Commissioner for the District of Oregon, said affidavit, search warrant and inventory and return being hereto annexed and marked "Petitioner's Exhibit A." Said Exhibit A being a duly certified copy of the said proceedings certified to by G. H. Marsh, Clerk of the United States District Court for the District of Oregon under date of April 20, 1921, by L. S. Rogers, Deputy Clerk, attested with the seal of said court.

That your petitioner at said time also leased, occupied and controlled offices at 220 Chamber of Commerce Bldg., Portland, Oregon, and that on the said 28th day of December, 1918, certain officers of the United States Government whose names are to the petitioner unknown, unlawfully and without proper warrant or authority so to do, entered your petitioner's offices and seized all of his books, letters, papers, notes, diaries, legal instruments, and other personal property in said offices which petitioner is now unable to describe, and this in violation of the fourth and fifth Amendment to the Constitution of the United States and also in violation of the Act of June 15, 1917, Chapter 30, Title 11, Sections 1-23 thereof, 40 Stat. 217-228, United States Laws, also known as Chapter 16 of

Barnes Federal Code, being paragraphs 10050-10069 inclusive.

That said forcible seizing and taking of papers and other personal property from the offices of your petitioner was under the color of a purported and alleged search warrant based on an alleged affidavit of one W. R. Bryon, a United States official, said warrant being issued by the Hon. Frederick H. Drake, United States Commissioner for the District of Oregon, said affidavit, search warrant and inventory and return being hereto annexed and marked "Petitioner's Exhibit B," said Exhibit B being a duly certified copy of said proceedings certified to by G. H. Marsh, Clerk of the United States District Court for the District of Oregon, under date of April 20, 1921, by L. S. Rogers, Deputy Clerk, attested with the seal of said court.

Petitioner by his reference to Exhibits A and B makes the said exhibits a part of this petition.

That the United States District Attorney, Marshal and Clerk of the United States Court for the District of Oregon took the above described property and the property more particularly described in the alleged inventory and return in Exhibits A and B and seized as heretofore described, in their possession and have failed and refused to return to the defendant a portion of the same, to-wit: one volume of carbon copies of letters, two volumes of diaries and memorandums, and loose pages thereof, and certain other property which peti-

tioner is now unable to describe.

That said property is being unlawfully and improperly held by said United States District Attorney, Marshal, and Clerk of the United States Court for the District of Oregon in violation of defendant's rights under the Constitution of the United States and also of the laws of the United States.

That said District Attorney proposes to use said books, letters, papers, etc., at the trial of the above entitled cause, and that by reason thereof and of the facts above set forth, petitioner's rights under the Amendments aforesaid to the Constitution of the United States and the laws of the United States have been and will be violated unless the court orders the return prayed for herein.

Petitioner alleges that the said search warrant and proceedings thereunder heretofore set forth in Exhibits A and B among other defects are defective and void by reason of the following: That the affidavit upon which said search warrants, and each of them, was issued does not set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; that the affidavit, and each of them heretofore referred to, does not particularly describe the property to be seized; that said affidavit, or either of them, does not state that the alleged felony or crime concerning which papers, etc., are to be seized, was committed, if at all, within the Statute of



Limitation as provided by law; that no copy of the heretofore described warrants, or either of them, or receipt for the property so seized, (specifying it in detail), was given to the person from whom it was taken or in whose possession it was found, nor was any receipt left in the place where the property was found; that no inventory describing said property in detail was ever made or filed by anyone in either of the above search warrant proceedings; that no order of any proper judge or commissioner was ever made finding that the property or papers taken under said search warrants, or either of them, is the same as that described in the warrants, or that there is probable cause for believing the existence of the grounds on which the warrants were issued; that no order of any proper judge or commissioner was ever made ordering the retention or custody or other disposition of any of the property so seized.

That all of the foregoing proceedings herein alleged were in plain violation of the fourth and fifth Amendment of the Constitution of the United States and of the laws of the United States, and that your petitioner's constitutional and legal rights will be further violated unless the court orders the return prayed for herein;

WHEREFORE, your petitioner respectfully prays that said United States District Attorney, Marshal, and Clerk, all of the District of Oregon, be notified, and that the court direct and order said United States

District Attorney, Marshal, and Clerk to return said property so seized to said petitioner, together with any and all copies, stenographic or photographic or otherwise made thereof.

And your petitioner will ever pray!

(Sgd.) JOSEPH WOERNDLE,

Petitioner.

(Sgd.) W. P. LA ROCHE,

C. T. HAAS,

Solicitors for Defendant.

STATE OF OREGON,

COUNTY OF MULTNOMAH, ss.

I, Joseph Woerndle, being first duly sworn, depose and say: that I am the above named petitioner, and that I have read the foregoing petition and that I believe the same to be true.

So help me God!

(Sgd.) JOSEPH WOERNDLE,

Affiant.

Subscribed and sworn to before me, a notary public, this 30th day of November, 1921.

(Sgd.) C. T. HAAS,

Notary Public for Oregon.

My commission expires February 8, 1925.

PETITIONER'S EXHIBIT A.

UNITED STATES OF AMERICA,

District of Oregon, ss.

On this 28th day of December, 1918, before me, Frederick H. Drake, United States Commissioner for the District of Oregon, comes W. R. Bryon, Special Agent of the Department of Justice, and upon oath says that he has good reason to believe and does verily believe that within and upon certain premises within said district, to-wit: On the premises of Joseph Woerndle, at 710 Flanders Street, in the City of Portland, County of Multnomah, State of Oregon, there has been concealed and is now concealed in and about said premises occupied by said Joseph Woerndle at said place, certain property, to-wit:

Certain letters, correspondence, books, papers, telegrams, checks, cablegrams, and documents and stenographic notes concerning the same, used in the dealings between said Joseph Woerndle and Hans Boehme, alias Jelks LeRoy Thrasher, J. H. Brogan, the firm of Woerndle & Hansen, Elsie Ambruster, one Ruiz, and others,

Which said property has been used as a means to commit certain felonies, that is to say, the felony of furnishing to another to use a passport, the issue of which was secured by false statements, and the felony of falsely making and causing to be falsely made a passport with the intent that the same should be used by another.

WHEREFORE, this affiant prays that a search warrant authorizing the Marshal of the United States for

said district, or his deputies, or any or either of them, to search said premises in the day time and to seize and take such property into his or their possession, pursuant to the statute in such case made and provided.

W. R. BRYON.

Subscribed and sworn to before me this 28th day of December, 1918.

(Seal)

FREDERICK H. DRAKE,  
United States Commissioner for  
the District of Oregon.

### SEARCH WARRANT

UNITED STATES OF AMERICA,

District of Oregon, ss.

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA

To the Marshal of the United States for the District  
of Oregon and his deputies or any or either of them:  
GREETING:

WHEREAS, W. R. Bryan, Special Agent Dept. of Justice, has this day made oath in writing before me, FREDERICK H. DRAKE, a United States Commissioner for the District of Oregon, alleging that he has reason to believe and does believe that a violation of the laws of the United States, to-wit, Section 37 P. C., has been and is being committed upon and by the use of certain premises in this district, to-wit:

Premises of Joseph Woerndle, 710 Flanders

Street, Portland, Oregon,

in this that there has been concealed and is now concealed in and about said premises certain property, to-wit, certain letters, books, papers, documents, telegrams, cablegrams, checks, etc., used in dealings between one Joseph Woerndle and Hans Boehme, et al, which said property has been used as a means to commit certain felonies, to-wit: to secure the use of a passport, the issue of which was secured by false statements, for the use of another:

NOW THEREFORE, you are hereby authorized and commanded, in the name and by the authority aforesaid, forthwith to enter said premises, with the necessary and proper assistance, and there investigate and search into and concerning said crime and to make proper return thereof.

WITNESS my hand and seal at Portland, in said district, this 28th day of December, 1918.

FREDERICK H. DRAKE,  
(Seal) United States Commissioner  
District of Oregon.

UNITED STATES OF AMERICA,  
District of Oregon, ss.

I hereby certify and return that I served the annexed search warrant on Mrs. Joseph Woerndle, at 710 Flanders Street, Portland, Oregon, by reading same to her.



I further certify and return that I took into my possession the following, to-wit:

(1) 1 russett suitcase containing miscellaneous correspondence and post cards.

(2) 2 letter files containing miscellaneous correspondence.

(3) 2 wooden boxes containing miscellaneous correspondence and photographs.

(4) 1 pasteboard suit box containing miscellaneous correspondence post cards.

(5) 1 pasteboard carton containing miscellaneous correspondence and post cards.

(6) 1 picture of Hans Boehme in full Imperial German uniform, mounted in a frame displaying German eagle and military coat of arms at top and bottom of same.

(7) 1 Imperial German military saber and scabbard, property of Hans Boehme, mounted on a frame on which appears the German coat of arms.

Done and dated at Portland, Oregon, on the 28th day of December, 1918.

GEO. F. ALEXANDER,

United States Marshal for the  
District of Oregon.

By MARK HOLMES, Deputy.

Filed, December 28, 1918, F. H. Drake, U. S. Commissioner.

Filed, November 14, 1919, G. H. Marsh, Clerk, U. S. District Court.

UNITED STATES OF AMERICA,

District of Oregon, ss.

I. G. H. MARSH, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of affidavit for search warrant of premises at 710 Flanders Street, Portland, Oregon, and search warrant issued thereon, together with return of service, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 20th day of April, 1921.

G. H. MARSH, Clerk.

(Seal) By L. S. ROGERS, Deputy Clerk.

PETITIONER'S EXHIBIT B

UNITED STATES OF AMERICA,

District of Oregon, ss.

On this 28th day of December, 1918, before me, Frederick H. Drake, United States Commissioner for the District of Oregon, comes W. R. Bryon, Special Agent of the Department of Justice, and upon his oath says that he has good reason to believe and does verily

believe that within and upon certain premises within said district, to-wit: In the office of Joseph Woerndle at number 220 Chamber of Commerce Building, in the City of Portland, County of Multnomah, State of Oregon, there has been concealed and is now concealed in and about said premises certain property, to-wit:

Certain letters, correspondence, books, papers, telegrams, checks, cablegrams, and documents, and stenographic notes of the same, used in the dealings between said Joseph Woerndle and Hans Boehme, alias Jelks LeRoy Thrasher, J. H. Brogan, the firm of Woerndle & Hansen, Elsie Armbruster, one Ruiz, and others,

Which said property has been used as a means to commit certain felonies, that is to say, the felony of furnishing to another to use a passport, the issue of which was secured by false statements, and the felony of falsely making and causing to be falsely made a passport with the intent that the same should be used by another.

WHEREFORE, this affiant prays that a search warrant authorizing the Marshal for said district, or his deputies, or any or either of them, to search said premises in the day time and to seize and take such property into his or their possession, pursuant to the statute in such case made and provided.

W. R. BYRON.

Subscribed and sworn to before me this 28th day of December, 1918.

FREDERICK H. DRAKE,  
United States Commissioner for  
the District of Oregon.

UNITED STATES OF AMERICA,

District of Oregon, ss.

This is to certify and return that I have on the 28th December, 1918, searched the within mentioned premises and seized articles enumerated on back of warrant.

G. F. ALEXANDER,  
United States Marshal.

By R. D. CARTER, Deputy.

Dated at Portland, Oregon, this 28th day of December, 1918.

#### SEARCH WARRANT.

UNITED STATES OF AMERICA,

District of Oregon, ss.

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA

To the Marshal of the United States for the District  
of Oregon and his deputies or any or either of them:  
GREETING:

WHEREAS, W. R. Bryan, Special Agent Dept. of Justice, has this day made oath in writing before me, FREDERICK H. DRAKE, a United States Commis-

sioner for the District of Oregon, alleging that he has reason to believe and does believe that a violation of the laws of the United States, to-wit, Section 37, P. C., has been and is being committed upon and by the use of certain premises in this district, to-wit:

Office of Joseph Woerndle, at No. 220 Chamber of Commerce Building, Portland, Oregon, in this that there has been concealed and is now concealed in and about said premises certain property, to-wit, certain letters, books, papers, documents, telegrams, cablegrams, checks, etc., used in dealings between one Joseph Woerndle and Hans Boehme, et al, which said property has been used as a means to commit certain felonies, to-wit: to secure the use of a passport, the issue of which was secured by false statements, for the use of another:

NOW THEREFORE, you are hereby authorized and commanded, in the name and by the authority aforesaid, forthwith to enter said premises, with the necessary and proper assistance, and there investigate and search into and concerning said crime and to make proper return thereof.

WITNESS my hand and seal at Portland, in said district, this 28th day of December, 1918.

FREDERICK H. DRAKE,  
United States Commissioner,  
District of Oregon.

(Seal)



(On back of warrant):

4 filing cases full papers.

2 bound books of letters.

16 copies Bundes Wacht.

1 volume of letters and scrapbook.

6 small red books. Mem.

1 red mem. book.

1 linen back order book.

1 paper envelope with In re H. W. Boehme.

Envelope with citizenship papers of Jos. Worener.

Articles Incorp. of Golden Rod M. & M. Co.

102 stenographer's note books.

Filed, December 28, 1918, F. H. Drake, U. S. Commissioner.

Filed, November 14, 1919, G. H. Marsh, Clerk, U. S. District Court.

## UNITED STATES OF AMERICA,

District of Oregon, ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of affidavit for search warrant to search premises No. 220 Chamber of Commerce Building, Portland, Oregon, and search warrant issued thereon together with return of service, has been by me compared with the original thereof. and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record

and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this 20th day of April, 1921.

(Seal)

G. H. MARSH, Clerk.

By L. S. ROGERS, Deputy Clerk.

AND AFTERWARDS, to-wit, on the 5th day of December, 1921, an order was duly made in said court and cause as follows:

### ORDER FOR RETURN OF PROPERTY

This matter coming on for hearing on the motion of defendant for an order requiring the return to defendant of certain papers, books and other property taken from him by the United States Marshal on the 28th day of December, 1918, under color of a search warrant, plaintiff appearing by the United States Attorney and the defendant appearing by W. P. La Roche and C. T. Haas; and the court after hearing arguments of counsel and the United States District Attorney having admitted in open court that the search warrants in question do not comply with statutory and constitutional requirements, and the court being fully informed in the premises, now therefore,

IT IS ORDERED that the United States Attorney, United States Marshal and Clerk of this court return to the defendant Joseph Woerndle, all property in their possession taken by the said Marshal on December 28,

1918, under color of said search warrant or search warrants.

IT IS FURTHER ORDERED that the said United States Attorney, United States Marshal and the Clerk of this court are not directed or required to deliver to said defendant any or all copies, stenographic, photographic or otherwise, made of any of the things so taken by the said Marshal on December 28, 1918, under color of said search warrant. Questions as to the admissibility in evidence of such books, papers or property or copies thereof are reserved until the trial of this case.

AND AFTERWARDS, to-wit, on the 24th day of December, 1921, the United States Attorney filed in said court a certificate as follows:

### CERTIFICATE

I, Lester W. Humphreys, United States Attorney for the District of Oregon, certify that on the 13th day of December, 1921, pursuant to an order of the above entitled court in the above entitled cause, I delivered to the defendant, Joseph Woerndle personally and in person, all the property of the said Joseph Woerndle taken from him under color of search warrant, in my possession, to-wit:

1 book described on the fly leaf "Tagebuch des Joseph Woerndle, Volume II," containing entries beginning January 1, 1921, together with an extra sheet

containing pages 109 and 110.

1 bound volume of carbon copies of letters.

1 letter containing an envelope bearing postmark "Salt Lake City, Utah, Feb. 7, 1916, addressed to Joseph Woerndle, the letter being typewritten, dated Lille, France, Jan. 3, 1916 and signed in typewriting H. W. B. Berlin—Holences Kurfuerstendamm—100,3.

1 carbon copy of letter in German, dated Feb. 18, 1916, addressed Lieber Vater and mutter.

1 carbon copy of letter in German, dated 5-31-15 addressed Mein lieber Herr Horner, signed Joseph Woerndle.

1 carbon copy of letter in German, dated July 26, 1915, addressed to Herrn Kaspar Worndl and signed Euer dankbarer sohn.

1 carbon copy of letter in German, dated Mai 14, 1915, addressed Liebe Eltern and signed Euer dankbarer sohn.

1 carbon copy of letter in German, dated Jan. 20, 1916, addressed Herrn Kaspar Worndl Jr., signed Dein treuer bruder.

1 carbon copy of letter in German, dated Dec. 10, 1915; addressed Herrn Kaspar Worndl, Jr., and signed Dein dir treuer bruder.

1 carbon copy of letter in German, dated Nov. 26, 1915, addressed Herrn Kaspar Worndl, signed Dein dich liebender dankbarer sohn.

1 carbon copy of letter in German, dated 5-31-15,

addressed Lieber bruder Kaspar and signed Dein ergebener brudar Joseph Woerndle.

1 carbon copy of letter in German, dated 6-5-15, addressed Liebe Tante signed Dein dankbarer neffe, Joseph Woerndle.

1 carbon copy of letter in German, dated Mai 8-16 addressed Herrn Donatus Woerndle and signed Dein dich liebender treuer bruder.

1 carbon copy of letter in German, on two sheets, dated Nov. 26, 1915 addressed Herrn Kaspar Worndl, Jr., and signed Dein dir treuer anhaenglicher bruder.

1 carbon copy of letter in German, dated Sept. 15, 1917, addressed Herrn Kaspar Worndl and signed Dein stets dankbarer sohn.

1 carbon copy of letter in German, dated 6-3-15, addressed Meine Liebe tante and signed Dein dich libender neffe, on the reverse side of which is a carbon copy of letter in German dated 6-3-15 addressed Meine Liebe tante and signed Dein treuer dich libender neffe.

1 carbon copy of letter in German dated Feb. 18, 1916, addressed Frau Donatus Worndl and signed Dein aufrichtiger schwager.

1 carbon copy of letter in German, dated Feb. 18, 1916, addressed Frau Anna Woerndle and signed Dein dir dankbarer neffe, Joseph Woerndle.

1 photograph of Hans W. Boehm in German uniform in frame with German Coat of Arms.



1 saber and scabbard in frame with German Coat of Arms.

LESTER W. HUMPHREYS,  
United States Attorney.

AND AFTERWARDS, to-wit, on the 14th day of February, 1922, there was duly filed in said court and cause a motion as follows:

**MOTION FOR PRODUCTION OF DOCUMENTS**

NOW COMES the plaintiff, by Lester W. Humphreys, United States Attorney for the District of Oregon, and moves the court for an order that defendant be required to produce at the trial of the above entitled cause, the following:

1 book described on the fly leaf "Tagebuch des Joseph Woerndle, Volume II," containing entries for the year 1914, together with an extra sheet containing pages 109 and 110 of said book.

1 bound volume of carbon copies of letters containing a letter dated October 3, 1914, addressed "His Excellency Wm. J. Bryan, Secretary of State, Washington, D. C.

1 letter contained in an envelope bearing postmark "Salt Lake City, Utah, Feb. 7, 1916, addressed to Joseph Woerndle, the letter being typewritten, dated Lille, France, Jan. 3, 1916, and signed in typewriting H. W. B. Berlin—Holenees Kurfuerstendamm—100.3.

1 carbon copy of letter in German, dated Feb. 18,

1916, addressed Lieber Vater and mutter.

1 carbon copy of letter in German, dated 5-31-15, addressed Mein Lieber Herr Horner, signed Joseph Woerndle.

1 carbon copy of letter in German, dated July 26, 1915, addressed to Herrn Kaspar Worndl and signed Euer dankbarer sohn.

1 carbon copy of letter in German, dated Mai 14, 1915, addressed Liebe Eltern and signed Euer dankbarer sohn.

1 carbon copy of letter in German, dated Jan. 20, 1916, addressed Herrn Kaspar Worndl, Jr., signed Dein treuer bruder.

1 carbon copy of letter in German, dated Dec. 10, 1915, addressed Herrn Kaspar Worndl, Jr., and signed Dein dir treuer bruder.

1 carbon copy of letter in German, dated Nov. 26, 1915, addressed Herrn Kaspar Worndl, signed Dein dich liebender dankbarer sohn.

1 carbon copy of letter in German, dated 5-31-15, addressed Lieber bruder Kaspar and signed Dein ergebener bruder Joseph Woerndle.

1 carbon copy of letter in German, dated 6-5-15, addressed Liebe Tante signed Dein dankbarer neffe, Joseph Woerndle.

1 carbon copy of letter in German, dated Mai 8-16, addressed Herrn Donatus Woerndle and signed Dein dich liebender treuer bruder.

1 carbon copy of letter in German, on two sheets, dated Nov. 26, 1915, addressed Herrn Kasper Worndl, Jr., and signed Dein dir treuer anhaenglicher bruder.

1 carbon copy of letter in German, dated Sept. 15, 1917, addressed Herrn Kaspar Worndl and signed Dein stets dankbarer sohn.

1 carbon copy of letter in German, dated 6-3-15, addressed Meine Liebe tante and signed Dein dich libender neffe, on the reverse side of which is a carbon copy of letter in German dated 6-3-15 addressed Meine Liebe tante and signed Dein treuer dich libender neffe.

1 carbon copy of letter in German dated Feb. 18, 1916, addressed Frau Donatus Worndl and signed Dein aufrichtiger schwager.

1 carbon copy of letter in German, dated Feb. 18, 1916, addressed Frau Anna Woerndle and signed Dein dir dankbarer neffe, Joseph Woerndle.

1 photograph of Hans W. Boehm in German uniform in frame with German Coat of Arms.

1 saber and scabbard in frame with German Coat of Arms.

This motion is based upon the records and files in the above entitled court and cause and upon the affidavit hereto attached.

Dated at Portland, Oregon, this 14th day of February, 1922.

LESTER W. HUMPHREYS,  
United States Attorney.

I hereby certify that in my opinion each and all of the foregoing documents and things will be relevant and material at the trial of the issue in the above entitled court and cause.

LESTER W. HUMPHREYS,  
United States Attorney.

### **AFFIDAVIT**

UNITED STATES OF AMERICA,  
DISTRICT OF OREGON, ss.

I, Lester W. Humphreys, being first duly sworn, say:

That I am United States Attorney for the District of Oregon; that I make this affidavit in support of the motion and to which this affidavit is attached; that the books, letters, papers and things set out in the attached motion, are in the possession or under the control of the defendant; that said books, letters, papers and things are pertinent and material to the issues in the above entitled case for the following reasons:

This is a case wherein the United States seeks to cancel the citizenship of Joseph Woerndle upon the ground of fraud in the procurement of said citizenship, as alleged in the plaintiff's bill in this cause to which reference is made for greater particularity. That at the trial of this cause, plaintiff will endeavor to prove

by conduct and statements of the defendant, subsequent to the time of his naturalization, what his condition of mind was at the time he was admitted to citizenship and renounced allegiance to the Emperor of Germany and declared his allegiance to the United States; that the book referred to as "Tagebuch des Joseph Woerndle, Volume II," with extra sheets containing page 109 and 110 of said book, contain entries written in the hand writing of defendant between the 1st and 6th of October, 1914, and at other times showing that the defendant then knowing that one Hans W. Boehm intended to return to Germany to join the colors, made an application to the Secretary of State of the United States for a passport intending that said passport should be used by Hans W. Boehm, and to enable the said Hans W. Boehm to travel in the name of Joseph Woerndle from the United States to Germany.

That the book described as bound volume of carbon copies of letters contains the carbon copy of a letter written by the defendant on the 3rd of October, 1914, transmitting the application for passport, above referred to, to the Secretary of State at Washington, D. C.; that the letter referred to in the attached motion, dated Lille, France, Jan. 3, 1916, contains a statement of said Hans W. Boehm to the defendant Joseph Woerndle that he, the said Hans W. Boehm, was a German Captain detailed to the General Staff and a Knight of the Iron Cross; that the several carbon copies of letters in German, referred to in the attached motion, are material and pertinent in that they con-



tain expressions of the attitude of the defendant as between the United States and Germany, when the defendant believed that the United States was about to enter the war, and such letters show that in those circumstances the allegiance of the defendant was with Germany and not with the United States; that said letters contain statements of which the following is typical:

"Judging by present circumstances, this country too will be at war with Germany, dear, beloved, unfortunate, Germany \* \* \* If I were over there today, as I was three years ago, I would not hesitate to sacrifice my all for the beloved old Fatherland. For now, for the first and for perhaps the last time, Germany is in need of the utmost help from child to old man in order to be saved from the claws of its arch enemies, England and her Allies. \* \* \* If it was not for my family here, I should long ago gone back to my old home in order to help in this time of heaviest need, but as things are now, that is impossible. \* \* \* The United States like the mob would be glad of the opportunity to "hand Germany one," but I guess the German michel dos'nt have to be very much afraid. The United States is very loud mouthed, but when it comes to action, very lame. This nation couldn't even force rotten Mexico to salute the American flag."

The foregoing quotations are taken from a translation of a carbon copy of a letter in German, dated Mai 14, 1915, addressed "Liebe Eltern and signed Euer dankbarer sohn, referred to in the attached motion.

Another letter dated June 5, 1915, addressed "Liebe Tante" and signed "Dein dankbarer neffe" referred to in the attached motion contains among other things, the following:

"I am ashamed of the attitude of the American Nation, because they can never make reparation for it, but in spite of all activities and diligence and efforts of the Germans in Washington, no impression seems to be made. \* \* \* If I were in Germany, as I was three years ago, I would gladly allow myself to be put in uniform or in any other way be of use to the Fatherland. \* \* \* This is probably the last letter I will be able to send you directly, because if I don't deceive myself, the American Government is trying with all its power to break relations with Germany, and when once diplomatic relations are broken then a declaration of war will not be long in coming. Then perhaps something will take place here that no one has any idea of."

That the photograph of Hans W. Boehm, in German uniform in a frame with the German Coat of Arms, is pertinent and material because this photograph was delivered to the defendant by Hans W.

Boehm on the 3rd or 4th of October, 1914, at the time the defendant applied for a passport for the use of Boehm, as above stated, and shows that the defendant Woerndle then knew the military character of said Hans W. Boehm.

The saber and scabbard, in frame, referred to in the attached motion, were delivered by Boehm to Woerndle at the same time with the photograph, above referred to, and is a circumstance indicating the defendant's knowledge of the German military character of Boehm.

That all the items referred to in the attached motion were taken from the possession of the defendant Joseph Woerndle, under a search warrant and were heretofore delivered to the defendant Woerndle personally by affiant in obedience to an order in the above entitled court.

LESTER W. HUMPHREYS.

Subscribed and sworn to before me this 14th day of February, 1922.

JOHN C. VEATCH,  
Notary Public for Oregon.

My commission expires: 11/14/24.

AND AFTERWARDS, to-wit, on the 27th day of February, 1922, an order was made in said court and cause as follows:

## ORDER TO PRODUCE DOCUMENTS

THIS CAUSE coming on for hearing on motion of plaintiff for an order that defendant be required to produce at the trial of the above-entitled cause in this court, certain books, letters, papers and other things, plaintiff appearing by Lester W. Humphreys, United States Attorney, and defendant appearing by Walter P. La Roche and C. T. Haas,

IT IS ORDERED that the defendant herein produce in the above entitled court, at the trial of the above entitled cause, on March 14, 1922, the following:

1 book described on the fly leaf "Tagebuch des Joseph Woerneld, Volume II," containing entries for the year 1914, together with an extra sheet containing pages 109 and 110 of said book.

1 bound volume of carbon copies of letters containing a letter dated October 3, 1914, addressed "His Excellency Wm. J. Bryan, Secretary of State, Washington, D. C."

1 letter contained in an envelope bearing postmark "Salt Lake City, Utah, Feb. 7, 1916, addressed to Joseph Woernle, the letter being typewritten, dated Lille, France, Jan. 3, 1916, and signed in typewriting H. W. B. Berlin—Holenees Kurfuerstendamm—100.3."

1 carbon copy of letter in German, dated Feb. 18, 1916, addressed Lieber Vater and mutter.

1 carbon copy of letter in German, dated 5-31-15,

addressed Mein Lieber Herr Horner, signed Joseph Woerndle.

1 carbon copy of letter in German, dated July 26, 1915, addressed to Herrn Kasper Worndl and signed Euer Dankbarer sohn.

1 carbon copy of letter in German, dated Mai 14, 1915, addressed Liebe Eltern and signed Euer Dankbarer sohn.

1 carbon copy of letter in German, dated Jan. 20, 1916, addressed Herrn Kasper Worndl, Jr., signed Dein treuer bruder.

1 carbon copy of letter in German, dated Dec. 10, 1915, addressed Herrn Kasper Worndl, Jr., and signed Dein dir treuer bruder.

1 carbon copy of letter in German, dated Nov. 26, 1915, addressed Herrn Kasper Worndl, signed Dein dich liebender dankbarer sohn.

1 carbon copy of letter in German, dated 5-31-15, addressed Lieber bruder Kasper and signed Dein ergebener bruder Joseph Woerndle.

1 carbon copy of letter in German, dated 6-5-15, addressed Liebe Tante signed Dein dankbarer neffe, Joseph Woerndle.

1 carbon copy of letter in German, dated Mai 8-16, addressed Herrn Donatus Woerndle and signed Dein dich liebender treuer bruder.

1 carbon copy of letter in German, on two sheets, dated Nov. 26, 1915, addressed Herrn Kasper Worndl,



Jr., and signed Dein dir treuer anhaenglicher bruder.

1 carbon copy of letter in German, dated Sept. 15, 1917, addressed Herrn Kasper Worndl and signed Dein stets dankbarer sohn.

1 carbon copy of letter in German, dated 6-3-15, addressed Meine Liebe tanta and signed Dein dich liebender neffe, on the reverse side of which is a carbon copy of letter in German dated 6-3-15 addressed Meine Liebe tante and signed Dein treuer dich liebender neffe.

One carbon copy of letter in German dated Feb. 8, 1916, addressed Frau Donatus Worndl and signed Dein aufrichtiger schwager.

One carbon copy of letter in German dated Feb. 8, 1916, addressed Frau Anna Woerndle and signed Dein dir dankbarer neffe, Joseph Woerndle.

1 photograph of Hans W. Boehm in German uniform in frame with German Coat of Arms.

1 saber and scabbard in frame with German Coat of Arms.

Objections on the part of the defendant to admission in evidence at the trial of any of the foregoing and all questions touching the constitutional rights of the defendant in connection therewith, are reserved for consideration at the trial and may be urged by defendant at said trial.

Dated at Portland, Oregon, February 27, 1922.

AND AFTERWARDS, on the 18th day of March, 1922, said cause came on for trial before the court,

And on the 18th day of March, 1922, there was duly filed in said court and cause a stipulation as follows:

### STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by the parties hereto by their attorneys, that at the trial of the above entitled cause the facts hereinafter stated shall be taken and deemed to be true; that no evidence thereof shall be required to be offered or produced by either of the parties hereto and the parties hereby expressly waive any and all objections of every kind as to the manner of proof and as to the sufficiency of the proof of the facts hereinafter stated. All other objections as to the competency, relevancy and materiality of these facts are reserved.

This stipulation may be read at the trial by either of the parties hereto. The facts hereby stipulated are:

Defendant, Joseph Woerndle, was born at Bernau, Bavaria, Germany, August 3, 1880, of German parents; said defendant emigrated to the United States, sailing from Bremen, Germany, in July, 1897. That said defendant Joseph Woerndle, at the time of his hearing in open court on his application for naturalization on the 23rd day of August, 1904, in the Superior Court of the State of Washington, for Pacific County, and as a part of defendant's naturalization proceedings,

declared on oath before the said Superior Court of the State of Washington for Pacific County that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly to the Emperor of Germany of whom he was a citizen or subject and then and there took the oath in the prescribed form, that he would support the Constitution of the United States of America.

That in October, 1914, one Hans W. Boehm was subject to call in the German army; that from February, 1914, until the 6th of October, 1914, the said Hans W. Boehm resided at Portland, Oregon; that in October, 1914, and particularly from October 1st to October 6th, 1914, the defendant, Joseph Woerndle, was personally acquainted with said Hans W. Boehm and that said defendant then and there knew that said Hans W. Boehm was a citizen and subject of Germany and subject to military service of Germany, and that said Hans W. Boehm was then and there desirous of departing from the United States and returning to Germany to enter the military service of Germany.

Prior to the 3d day of October, 1914, Boehm discussed with Woerndle, Boehm's desire to return to Germany and join the colors.

On the 3d day of October, 1914, by agreement between Hans W. Boehm and defendant Joseph Woerndle, an application for a passport for Joseph Woerndle

was executed, thereafter the name "Joseph Woerndle" was signed to the said application by the said Hans W. Boehm and the passport being intended for the use of Hans W. Boehm. Whereupon Hans W. Boehm with the knowledge and consent of the defendant, Joseph Woerndle transmitted the said application for passport to the Secretary of State of the United States of America, with directions that the passport be sent addressed "Joseph Woerndle, c/o Waldorf-Astoria Hotel, New York City." Defendant, Joseph Woerndle, then and there delivered to said Hans W. Boehm a certified copy of the certificate of citizenship of defendant Joseph Woerndle, and an original patent for land in California to be used by the said Boehm in identifying himself as Joseph Woerndle.

On the said 3d day of October, 1914, the defendant, Joseph Woerndle, made the following entry in a diary on page 109 thereof:

"Boehm gave me power of atty. and drew will. I will furnish him with pass—& U. S. citizen papers so he can travel in my name. Also gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my address c/o Waldorf-Astoria, New York, where Boehm will call for it. Out with Paul Wessinger. Wessinger signed my application for pass as witness, saying he knew me 8 years."

Thereafter, on or about the 4th day of October, 1914, the said Hans W. Boehm placed in the custody of said defendant, Joseph Woerndle, the following articles of personal property:

One Shotgun

One Hat box

One clock

Two Pictures

One Saber

Fishing tackle and basket

Key to Safe Deposit Box

Abstract and storage receipt.

On the 6th day of October, 1914, Hans W. Boehm left Portland, Oregon, went to the Waldorf-Astoria Hotel at New York City, there asked for and received the passport issued to Joseph Woerndle on the aforesaid application of October 3, 1914, and the said Hans W. Boehm thereafter used the name and passport of Joseph Woerndle, traveled to Europe and thence forward, was active in the German military service while pretending to be Joseph Woerndle, an American citizen.

Thereafter and subsequent to October, 1916, Joseph Woerndle cut from his diary page 109 thereof containing the entry of October 3, 1914, above quoted and pasted in place thereof another page upon which he had re-written and consolidated the entries of October 2 and 3, 1914, said substituted re-written entries being as follows:



"Had a grand dinner with Paul Wessinger . . . .  
 . . . .and H. W. Boehm. Maybe I can't go with  
 Boehm after all, but he says he will go in spite of  
 hell. I only pity my poor father but then my own  
 family and children. Cecelia does not want me to  
 go and maybe I won't but can't just stay. At any  
 rate I will get my passport in shape so as to have  
 that part ready if I should decide to go. Wrote  
 to Sec. of State to forward my pass to Waldorf-  
 Astoria Hotel where I will call for it. Boehm  
 urges all he can for me to go with him. Maybe I  
 will but there will be a surprise when I am gone."

Constitutional and statutory rights and objections of  
 defendants in reference to following letters are re-  
 served.

On the 31st day of May, 1915, defendant Joseph  
 Woerndle wrote to one Hoerner a letter in German as  
 follows:

"5/31/15

My dear Mr. Hoerner:

Reading the news as they come over from all  
 sides, I am overcome with a feeling of sadness, and  
 as it now seems, and judging from today's even-  
 ing paper headlines, only God Almighty can save  
 us from war with my own Fatherland. It seems  
 now as if the American Government has lost its  
 head or is about to lose it. What will all happen  
 if this takes place is hard to imagine. One shud-

ders by the thought. The good, beautiful land where my cradle stood, poor, poor, Germany. The sword in hand it is now fighting nearly against the whole world. I shudder at the thought. What will all yet happen and what will be the outcome. Sad enough that our Government supplies the English ragpack and others with shiploads of ammunition, but wants now also to declare war on Germany. Almost unbelievable, and yet it may come to pass. For Germany to do what the Government here demands is unthinkable, because should they do that and call off submarine warfare, they may just as well ask for peace, for many hounds are the hares' death. But I hope it will not come that far. I cannot conceive how it is possible that Germany has held out this far, without provisions and soldier supply from without. And yet I expect and hope that Germany will come out victorious. How that is possible I cannot imagine, but she will and must be victorious. What is the consensus of opinion in Germany since now too Italy, the mutinous and treacherous brute, has drawn the dagger against Germany? How long is it possible for the supply of soldiers to last? I take from this evening's paper that the last reserves have already been called. Is this true? One cannot believe the local papers very much, and the German which now and then come over are al-

ready a month or two old when they get here. The whole matter is so immensely sad, with a solution not yet in sight. I received again yesterday newspapers from you, for which I thank you very much. I will send you from time to time newspaper clippings and newspapers so that you will also be posted about local happenings. My youngest brother was already drafted last January. Has 5 children and a wife. Horrible, if one thinks about it. Maybe the same will happen to us here. People here as it seems, are about to lose their whole sense, and it is hardly believable, that a country like ours, which has trumpeted out into the world the call of freedom and the protection of the weak, has stepped so low as to support a bloodstained, treacherous people like England, as it is now doing. But penalty will not remain away, and our neat Government will yet perhaps bitterly regret all. Him whom the Lord wishes to destroy, he smites with blindness, and the whole Wilson-Bryan Kraut will have a frightful responsibility for the millions of human lives destroyed thru our bullet manufacture. Write me please occasionally as to the true conditions and what you think of the future.

With hearty greetings to you and your good family, I am most respectfully,

Your devoted

(Sgd.) Joseph Woerndle."

On the 14th day of May, 1915, defendant, Joseph Woerndle, wrote a letter in German to his parents as follows:

"May 14, 1915.

Dear Parents:

Since I have not heard from you for a long time I take that my last letter to you has been lost. I set myself today again on the machine in the surmise that this perhaps will be the last letter for some time which may reach you. Judging from present conditions this country too will be involved in a war with Germany, loved, poor, unfortunate Germany. Haunted and persecuted by the whole world, under all possible excuses made, belied and invented. What the outcome may be is a riddle, but at any rate the whole world will rise in rebellion and when everything will be over, there will not be very many people left. What bullet and sword will not take, pest and collera will claim. It is horrible to think about it. And yet we have here in the land of plenty no conception. If I were out there today as 3 years ago, I would without hesitation sacrifice my all for loved old fatherland, for now for the first and perhaps the last time Germany is depending on all help from child to dotard to save it from the claws of

its archenemy, England and its allies. I learn with shudder of the colossal sacrifices which Germany now makes and its people, but it is better, a thousand times, to die the death for Fatherland than to eke out an existence in the shackles of the most sordid nation on earth, England. Were it not for my family here, I would have long ago returned to my old home to aid it in this time of greatest need, but as it is, such a thing is not possible. And Italy too will join the English, French and Russian hordes, and therefore will hope be put to a severe test. Times here are hard for many, for labor conditions are not the best, and thousands of people are out of employment, but we have nothing to complain, when one considers the misery of thousands, yes millions, who now have to suffer in Europe. Has Donat been drafted already? Hopingly not, for it would be horrible for his family. But perhaps nothing can be done. The American, moblike, would be glad if it could get one over on Germany, but the German Michael will not have to be afraid very much. The United States are noisy, but when it comes to do something they are slow. This nation could not force ragged Mexico to salute the American flag. They will not risk to go to Germany, otherwise the Japanese may soon take possession of the best part



of our coast, for they have aimed for it a long time. Our good President keeps shop open whenever it goes against the Germans, but whenever the English are guilty of anything, he is mum and blows the trumpet of peace. It fills me with sorrow if our beautiful country should be drawn into this sad war, for the will of the masses and the more sensible classes is not for it, but if it cannot be helped we will have to go to it, at least financially. Few Germans will shoulder arms, and of the others not many will put their head in front of a Howitzer and hence perhaps not everything will be lost at once. I am only sorry for the many human lives, but I may say to you, preserve to the last man for as I hope victory will yet go to the Germans.

Father, I would like very much if you would give Kaspar from allowance monthly Mk 10. I will instruct the German bank to send you monthly Mk 60. It will be awfully hard for poor Kaspar now, and this little gift buys him now and then a quart for his recuperation.

I am always very busy and work almost day and night. But there isn't much pay in it for the people have no money. I have bought me a little farm about 6 engl. miles or 2 hours west of Portland. 25 acres with house and barn. In my auto

I get there in 20 minutes. Wish you could be here with us on the "Farm." During vacation we will all move on the place. Running water, good soil, beautiful view with the lights of the city in sight.

We have beautiful weather and everything is in full blossom. The roses are all out and I fear there will not be any left for our rose carnival in June.

And now, dear Father, I will close for this time. I hope for the best, and hope that everything will pass over and that God may grant victory to Germany.

Write to me often, even if you do not get any letters from me, for half of the letters get lost.

Pray for me that I may remain well so that I can always support you.

Greeting you all heartily, I remain as ever

Your grateful son."

On the 31st day of May, 1915, defendant, Joseph Woerndle, wrote a letter in German to his brother Kaspar as follows:

"5/31/15

Dear Brother Kaspar:

I shall again try to write you, thinking that this letter may reach you. How it now looks at home I have no idea, since Italy too, the treacherous, mutinous pack has declared war on Germany and

Austria. It is horrible to think about it, and the outcome makes one shudder. Has Donat already been drafted with wife and 5 small children at home. And it now seems as if this country too wants to declare war on Germany. Considering the great sacrifice this war has cost already, one can hardly understand that there are yet soldiers left, without new additions or other supply from without. One can only do one thing and that is to leave all to God Almighty. How many have already fallen from the village of Bernau? And how many and who is in captivity? What do you think the future will bring? Kaspar, I have received the deed from Notary Weiss. I had it executed here and filed with my papers with a note, that if anything happens to me that it shall be sent to you. Kaspar, I do not know if after the war is over I will not return to the land of my cradle, and if I should do so would want to build a house on the place. I have three boys and these would perhaps be needed by my dear old Fatherland after the war. When the war is over I will know more how everything is. I have requested the bank at Munich to increase Father's allowance Mk 10 and requested him to give you Mk monthly so you can buy for yourself an extra little once in a while when you have to work hard. Write me how you are getting along and how your family is. Here

everything is as of yore. Business is very poor and altho I always have my hands full, people have no money to pay. Enclosed you will find a picture of my recently acquired farm. It lies about 6 engl. miles from Portland, and I can reach it in about 20 minutes in my car.

I often wish you could be here with us for a while. We have beautiful weather and roses have already blossomed, so early have they come out this year. Write me again soon how everything is and all news which occur. Sending my hearty greetings to you, your wife, children and little Godchild, and also Father, Mother, Donat, wife and children I remain as ever.

Your devoted brother.

Clothes would now hardly reach you, but I will try once more to send you a suit of clothes."

On June 3rd, 1915, defendant, Joseph Woerndle, wrote a letter in German to an aunt as follows:

"6/3/15

My dear aunt:

I received your dear letter just now and am very happy to have heard from you. I have written you twice already, but it seems that my letters have not reached you. I have not heard from you for a long time, and if you have written me, your letters did not get here. I am sorry your

husband has such a disease, and there cannot be much hope. Especially since he is so old. But then since there cannot be any hope, we must take everything in good grace. We have buried two weeks ago my dearest and oldest friend, W. Lengauer, to whom I first went when I came to America. He too suffered for the last two years from the same disease, and when he underwent an operation, he did not survive. I do not think that there is a cure except when a person sees to it in time. It is horrible about this war and the end is not yet in sight, and how it ends no one knows. I am ashamed of the action of the American government regarding Germany, for the people do not sanction these actions, but nothing can be changed. We do everything in our power to avoid the worst, but it's just like pouring water on a duck's back. But that America will be penalized for its double standard I have no doubt, just like Italy. My younger brother will already have joined the colors, since he was already drafted last December. Kaspar, the older one, is at home yet, since he is employed in the Post Office and they perhaps need him badly. Neither have I heard from Father for considerable time, and as you can imagine, he is worried very much. If I were out there I would also be found in the



trenches or on the battlefield—dead—. For I would not stay away. We have just received the news that Przemysl is fallen and in the hands of the confederates. What happy news but what against so many. We hope and pray that the Germans will win out in the end, but human strength only does not seem to make it possible. Now, dear Aunt, prepare yourself for the worst, for your strong constitution will prevail against it. Do your own thinking and work, rely only upon yourself and you will never be disappointed. If it should be possible for you to sell out, do so and invest your capital on interest, even if you have to lose a little, for you would avoid worry and cares, and would get your money regularly. Naturally the relatives of your husband would have no further concern for you after he is gone, and for that reason you must be double careful. Otherwise I am getting along all right. That is, I am in fairly good health and my family too. I am not earning anything for times here are miserable, and while we have a good practice, people have no money to pay for services. And now, dear Aunt, I shall close for this time. Have you the small cal. Goldpieces yet I sent you some time ago? I wish you would have a picture taken of all the goldpieces I sent you and send me a picture so I would know exactly how many you are yet lacking. Write me

again soon how you are and what happens. In the meantime I remain with hearty greetings to you and husband.

Your loving nephew."

On the 3rd day of June, 1915, defendant, Joseph Woerndle, wrote a letter in German to an aunt as follows:

"6/3/15.

My dear Aunt:

I have just received your letter of April 26th and learn with sadness of the illness of your beloved husband, but hope he will soon be all right again. Only do not lose courage and everything will be all right again. It is indeed horrible about this disastrous war, and I hope it will soon be over. The American way of dealing is much to be regretted and the consequences will not remain away. Just now news reached here that Przemysl was again conquered by the Austrians, which news naturally has caused considerable rejoicing among the Germans here. Otherwise everything is friendly towards England as far as the press is concerned, but not the people. Our ruling powers are related by kinship with the English aristocracy and there is where the dog lies buried. Could Washington rise from his grave he would be ashamed of our present administration, which as it appears, will

do anything to play into the hands of our archfoe, England. And too Italy, this low, treacherous band, has thrown herself into the arms of England. But she too will receive her reward for her high treason. Keep up hope, for God will righten everything, and Germany will and must be victorious. I have not heard from Father for some time and neither from my brothers. Donat was already drafted last December, and will no doubt be for some time on the firing line. And if I were out there, I would be found there too. And now, my dear Aunt, I must close for this time. Write me again soon and as often as you can for I always wait longingly for a letter from you. I wrote to you already a few times, but it seems all letters get lost. From you I have not received a letter for a long time. And now again hearty greetings to you and your dear husband. Hoping to hear from you again soon, I remain as ever your true, loving nephew."

On June 5th, 1915, defendant, Joseph Woerndle, wrote a letter in German to an aunt as follows:

"6/5/15.

Dear Aunt:

Your dear letter of March 28th has been received a short time ago, and I was real glad to hear from you. Yes, dear Aunt, it is horrible about this war, and an end not yet in sight. And now too

treacherous Italy is gone over to the other side and it seems to me that when this war is once over there will not be much young manhood left. I am ashamed of the action of the American nation for they can never make reparation for it, and yet in spite of all efforts and work it seems that the labors of the Germans make no impression in Washington. Under separate cover I am mailing you a copy of my newspaper. My editorial (signed) just about illustrates the true situation here. You also notice my appeal for aid, but so much has already been collected from other sources, and the people on account of growing indifferent, are not donating very much anymore. I wish I had the means, I would be glad to give all to beautiful old Fatherland to aid it in this hour of need. The young population, I imagine, will now make a meager showing on account of the heavy losses so far. Yesterday we received news that Przemyśl again came into the hands of the Austrians and that the Bavarians have taken a heroic part in the assault. I only hope that the Italians will get their neck broke for them and the English deserve the most. If I were in Germany, as 3 years ago, I would gladly allow myself to be put in uniform, or otherwise be of benefit to the Fatherland. My younger brother perhaps has already been drafted, since he was last fall already examined and found able. With 4 or 5 children on

his hand and a sick wife, this is to be regretted. Kaspar perhaps cannot be spared by the postal authorities since they need him very bad. How everything will come out, God only knows. What do you think about it? Do you think that the Germans will be victorious? God grant it! Here everything is stagnant, and business is at a standstill. Wilson with his half bankrupt machine is trying to bolster up with ammunition, powder and bullet trade his miserable stewardship, but he will not succeed and in one and one-half years he will be out. This monster will not again be reelected. And all in the most hypocritical fashion for "Humanity" and furthering of "Civilization." Such absurdity and hypocrisy. But he too will also get his reward. Perhaps after the war I will visit you, if only the climate were milder, but I cannot stand the cold weather. This is perhaps the last letter that I can send direct to you, for if I am not deceived, this country too tries to break with all force the peaceable relations with Germany, and if once diplomatic intercourse is suspended, a declaration of war will not be far off. Then something may develop here of which we have no conception. And now, dear Aunt, God be with you, for all will come out all right. Write me as often as you can. With heartiest greetings, I am as ever



Your grateful nephew."

On July 26th, 1915, defendant, Joseph Woerndle, wrote in German a letter to Kaspar Woerndl as follows:

"July 26, 1915.

Mr. Kaspar Wörndl,  
Irschen, Post Bernau a/Chimsee,  
Bayern.

Dear Parents:

I have just received your letter of June 30th and learn with great sorrow that Donat had to move to the front and that he is already 3 months incorporated in the field forces. Glad, however, to know that he received a furlough if only for 14 days, and hope if he has to go again he will return safely. Learn with regret that Osterhammer, Joseph and Seiser, Peter have fallen. How did Peter get in the hospital? As a wounded or otherwise sick?

I am astonished that you did not get any of my letters I have written you often. Naturally my letters are not eventless and contents may not suit.

It is shuddering if one takes into consideration the many human lives which this war has already claimed and yet will claim, but there is no turning back for Germany, for as a nation she would be gone if this war were lost. People here learn with admiration how the German people to the last man have collected around the flag and sacrificed the

last drop of blood for the salvation of German honor and the German nation. A people like the German is not to be found in the whole world, and if one reads of the English labor strikes and the like, it fills one with disgust, tho it be to the advantage of Germany; but one can see of what caliber the English are made. Apparently their own soldiers and statesmen turn traitors for a few shillings. It is hard to think that millions of young people, fathers of families and too old men are falling victims of this frightful war, but as said before, now there is no room for consideration nor retreat. Forward and forward is the battle cry until the last hostile flag covers the dust. The stand of our administration regarding the German course is, mildly said, regrettable. There is no more neutrality or impartiality for the second American note to the German government shows without doubt that the American government wishes to paralyze the submarine warfare so as to play in this way into the hands of Germany's enemies. How such a thing, considering the American war of independence with the same suppressor, England, is possible, is inconceivable and it seems that American gratitude is of short duration. How long this horrible war will last yet is perhaps better known to you than to us, and it will be only a question of who can sacrifice most people and mold most bullets. Perhaps with

the taking of Warsaw a sudden change may take place, and war may be ended over night if Russia sues for peace. But this is only to be wished. France will perhaps stay in longest with England, but once Russia is defeated, it may come to its senses, which of course would end the war faster. And now, dear parents, I hope that this will reach you and that all will come out all right.

How many have so far fallen from Bernau? There must be now many prisoners in the Bag Experimental station. From what side are they, Russian, French or English?

Hoping to hear from you soon, I am as ever,

Your grateful son.

Hearty greetings to Donat, if he is still at home, and his family, Kaspar and his family, as well as the acquaintances."

On November the 26th, 1915, defendant, Joseph Woerndle, wrote a letter in German to Kaspar Woerndl as follows:

"Nov. 26, 1915.

Mr. Kaspar Wörndl,  
Bernau a/Chimsee,  
Oberbayern, Bayern, Germany.

My dear Father:

I received your letter of September 15th rather delayed, and read your lines with interest. I regret very much to know that Donat is still at the front,

but hope he will return again healthy and happy to his family. I was rather astonished regarding the delay in the payment of your allowance, but this is perhaps due to postal interruption. I will see that in the future no such interruptions will occur. I can well imagine how everything goes with you, with the head of the family still at the front, and with the many children and Donat's sick wife. I have written her yesterday, which letter probably has arrived by now.

It is immensely sad to think of the misery which has come over poor Germany and other countries, with an end not yet in sight. Naturally here one has only an opportunity to get everything colored, and perhaps it looks darker here than in Germany, even in case of a victorious ending for the German flags. Since you have served two years in the war against France in 1870, you have perhaps a better idea as to what the ending of this war may be. Do you believe that Germany's finances and manpower will last long enough to insure victory? We hope and pray to God that Victory be to the German colors and that an early peace may be made. No doubt the French prisoners in your hands are faring better than your prisoners in France (and) or England, for the German heart is not so revengeful and cruel as the Frenchman's and I pity the fate of those Germans who have fallen in the enemy's

hands. The letter of my sister-in-law was so touching, and I hope that the prayer of the little ones will be heard. I hope, dear Father, that in spite of your 70 years you will live to see the end of the war and the return of Donat as well as a reunion of us all. Take good care of yourself so that you will always stay well. I will see that with God's help my allowance will punctually come into your hands for the payment of possible help on the place.

Enclosed find my check for Mk 50 for Christmas presents, which I ask you to distribute among the others as last year. I am sorry I cannot make it more, but conditions here are not the best, but hope that later everything will come out all right.

Let me also know if the German Bank makes any deduction from the monthly Mk 60. The bank charges my account with postage, which is small, but I was just wondering if they pay you the whole sum in full every month.

Hoping that this will reach you, Mother, Sister-in-law and children, Kaspar and children, in best of health and sending my heartiest greetings to you all, I am

Your loving grateful son."

On November the 26th, 1915, defendant, Joseph Woerndle, wrote a letter in German to Kaspar Woerndl, Jr., as follows:



"Nov. 26, 1915.

Mr. Kaspar Woerndl, Jr.,  
Bernau a/Chimsee,  
Oberbayern, Bayern,  
Germany.

Dear Brother Kaspar:

I received your letter of July 7th much delayed, but could not by reason of other things answer it right away. Your very explicit letter is welcomed because others were very short. Father with his shaking hand finds it more difficult to write than you. Yes, it is sad to think that Donat with his big family at home has to suffer all possible hardships in the enemy's land. But I hope that with God's help he will again return. In the meantime you will have to help all you can to keep everything agoing. How are you and your family and little Godchild getting along? Would be glad to see you all but this cannot well happen now. Times here are not the best and the our administration tries to avert a crash with ammunition trade, nothing, it seems is going ahead. There is no blessing in things of this kind, and the thought that this country has to enrich itself on thus acquired blood-money is not less horrible, but retribution will here also be in its wake, and the proverb, "As won so lost," will also here hold good.

Regarding my piece of land would say that both of you can use it. Only agree with one another. If Donat got the hay last year, you can plant it with vegetables this year. It matters nothing to me and as long as Donat is away, it should not be difficult for you to use it. But, Kaspar, always remember that you have a salary, whereas Donat has to get everything from the farm. Do for one another what is possible, and I will try all I can to help along. I shall have the deed which you sent me acknowledged before a consul and will then send it to you. But, dear Brother, I am doing this so you have it on hand in case something should happen to me, which no one knows, but only in case of my death I want you to inherit this land. As long as I live myself I may need it perhaps to build a house on it and to live in it if the Germans once should be chased out of here. Would not be regretted much for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left. How is everything otherwise out there. How many and who has fallen of the old comrades I used to know? Where is Donat? In Servia or Russia? Send me letters once in a while which he has written to you and in which he described conditions. He has never written to me personally, perhaps cannot for reasons. What do you think

of the future and the ending of the war? Write me again much and soon.

Sending hearty greetings to you, your wife, family and little Godchild, as well as to Father, Mother, Donat, wife and children, I am

Your true devoted Brother."

On December the 10th, 1915, defendant Joseph Woerndle, wrote a letter in German to Kaspar Woerndl, Jr., as follows:

"Dec. 10, 1915.

Mr. Kaspar Wöerndl, Jr.,  
Bernau a/Chimsee,  
Oberbayern, Bayern, Germany.

My dear Brother:

Enclosed I send you power of attorney regarding transfer to you of property belonging to me in Irschen, so that in case of my death you will have no trouble to get the property. In the meantime you and Donat can use it as you like.

I learn with great satisfaction from Father that Donat is yet alive and well in spite of the hardships of the war, and as it now looks, Germany has 3 Aces and England 1, with other Trump cards in Germany's hands. I expect eagerly every day the news edition, thinking that every hour may bring armistice and negotiations of peace, and yet that time is yet somewhat off. Victory for Germany too means much for us, for you have no idea how

much the German population and business world under present circumstances has to suffer, for the end of the war and a German victory means the resurrection of German influence in the whole world and would without doubt help us here too immensely. It is only to be regretted that so many human lives are sacrificed to accomplish this and nobody here has thought that, after even unfaithful Italy has joined in the English, French, Russian, Belgian, Servian, Montenegrin and Japanese (and many others) alliance. It is almost unbelievable and sounds like a fairytale, hard to believe, and only God's help, faith, German unity, belief, hope and denials have made it possible to achieve victory over the whole world. Here we did our best with money, agitations, etc., etc., but with an administration as we have it, not much can be accomplished. Only last week we held a Red Cross bazaar, and netted over \$3000, and thruout the whole United States people are busy working so that as much as possible can be done for the old Fatherland. I hope that the war will soon come to an end so that everything will again liven up and begin anew.

Sending to you, wife, children, Father, Mother, Sister-in-law and children my hearty greetings, I am, most respectfully,

Your true brother."

On January 20th, 1916, defendant, Joseph Worendle, wrote a letter in German to Kaspar Woerndl, Jr., as follows:

“January 20, 1916.

Mr. Kaspar Wöerndl, Jr.,

Bernau a/Chimsee,

Bayern, Germany.

My dear Brother:

I received your dear letter of November 22d, and observe that everything is going ahead tolerably. I also received a letter from my sister-in-law, Donat's wife, and I am immensely sorry to read of her plight between the lines. It must be horrible to know that he is now in the bloodiest angle of the whole war, where, as I consider it, it is almost a miracle to return alive; but of course nothing can be done to change it. We are trying with all our strength to persuade our administration to stop the criminal trade in arms with England and France, but have no prospects of success. But hope it don't benefit the others because German submarines are sinking most of the ships.

Regarding the building of a house on my property in Irschen, I wish to say that until the war is over there are no hopes, for times here are bad and everything uncertain. In your place I would not ask to be removed to Munich at this time, for Father has now nobody at home. The building



question is not a question of doing it, but a question of being able to do and under present circumstances, it is simply impossible. I would certainly like to see you helped in this regard, but for the present it is impossible to do.

I would like to get a photo from Donat in field uniform if one of them is obtainable. But I cannot write to him because my letters will not reach him and for that reason I would ask you to inform him of my wish and to send him my greetings, also my wish regarding photo.

Greeting you, little Godchild, wife and children, as well as Donat, wife and children, Father and Mother heartily, I am, as ever, with brotherly greeting

Your true brother."

On the 18th day of February, 1916, defendant, Joseph Woerndle, wrote a letter in German to his father and mother as follows:

"February 18, 1916.

Dear Father and Mother:

I have just received your dear letter and also that of dear sister-in-law, and notice with great sorrow that you were visited with so much sickness this year. It seems I would not care to live anymore if you were taken from us. Father, pray that you remain well so that I may see you once

more, only once, just once more. God will not take you from us, Father, so don't lose courage, and pray for me that I may stay well, in order to work so that I may give you comfort at least financially until this unhappy war is over. Take good care of yourself, Father, and too of Mother, for she too I want to see once more in this life, and also request of Mother that she pray for me, so I may get along well and be able to do for you much, much, very much yet. Everytime I take something in my hand which was given to me as a souvenir, I think of her. Tell her to take good care of herself so we can all see another once more. I have instructed the German Bank to pay you beginning with April \$100 per month until the war is over, and of this money I wish for you to keep Mk 50, to give Mk to sister-in-law, and give Mk 20 to Kasper every month. Poor Kasper writes that he was sick and I feel very sorry that everything seems to go wrong, but hope with God's grace that everything will be better again. Never refuse the poor or hungry a piece of bread and God the Almighty will never forget us, even tho sometimes things don't look the best. The war will and cannot last long anymore because this butchery is frightful. It paralyzes my hand if I just think about it. Father, if it was necessary I

would come out to help you at home and to take care of you until the war is over, for here things may get along without me, but if I can do more for you here, I had better stay here. Father, you have cared for us when we were small and helpless, you have worked day and night when we needed you, and now my dear Father I am ready to give my all to make the evening of your life as pleasant as possible. I am awfully sorry for Mother because she had to suffer so much, but God will spare us for her another joyful meeting. And this prayer goes heavenwards every day, with the prayer that nothing may happen to Donat and that he will again return happily.

Business here is very bad and I am working almost day and night to keep above water, but I never lack optimism, and as long as a person has that, things go all right. Maybe we will make something in our mines this year and we have decided to get them in operation in the near future, since the price of asbestos has gone up.

And now, dear Father, I shall close for this time, and in the hope that this will find you, Mother, sister-in-law and children and Kaspar and family in best of health, and that the horrible war will soon come to an end, I remain as ever

Your grateful son."

On the 18th of February, 1916, defendant, Joseph

Woerndle, wrote a letter in German to Mrs. Donatus Woerndl, as follows:

"Feb. 18, 1916.

Mrs. Donatus Woerndl,  
Irschen, Post Bernau,  
Oberbayern, Germany.

Dear Sister-in-law:

I have just received your letter and also the letter of Father and learn to my great sorrow that you have all been visited with sickness. It pains me intensely that in spite of all the other misery, you weren't spared of this visitation but trust to the divine providence of our Lord and He will make everything right again. He never forgets us if we do not lost faith in Him. I rejoice that much more since good Mother and dear Father are again on their way to recovery, and I hope and pray that when the next harvest comes this unfortunate sad war will be over. Although everything looks yet dark as the night, God will soon send us a ray of light, and the misery which poor Germany and its poor people withstood so faithfully and steadfastly will be turned into joy. Kasper too writes he was sick and I cannot illustrate the profound sorrow I feel for you. I have instructed the bank to send you beginning April Mk 100 instead of Mk 60 every

month and until this unhappy war is over and I have God's grace to send it. I would be glad to go over and help you at home if you think that I can do more for you in that way, but that is doubtful. Here times are miserable, at least out West. In the East things go somewhat better because the people have more work (perhaps in the ammunition factories). A shudder overcomes a person when one thinks that for filthy money millions of dollars worth of shrapnels are manufactured to slaughter thousands of young human lives. But all protestation appears to be fruitless. What visitations God Almighty reserves for us remains to be awaited, but we as Americans can surely expect no blessing for it. I hope and pray that Donat will return home well. We have decided to reopen our asbestos mines in Eastern Oregon in which I own a little less than one-third interest, in a few weeks, and I wish for you to pray that we are successful. We own in all something over 120 acres, or an acre of 600 feet wide and 6000 feet long. Alongside we hold a purchase option for 25 acres more rich asbestos land. The price of asbestos has gone up since the outbreak of the war, and I think the operation now can be made to pay. We also have acquired about \$2500 new machinery and I think we can compete against Canadian mar-



kets and competition. Asbestos is found only in Canada, Russia and only three places in the United States, of which ours is one. I am the President of the Mining Co., but do not concern myself with the mines themselves. The offices however are next to ours and under my direction. Debts we have none on the property neither on the ground nor machinery, but everything depends if we can sell the products at a price so as to make a profit, and this time I believe is at hand. After the war I shall send samples to Germany and perhaps supply the German needs and in this connection would make a trip to Germany. Will also send you samples later on.

And now, dear sister-in-law, I must close for this time, and altho it is already 9:30 P. M., I have yet to write a few letters. My private correspondence I attend to evenings myself.

Hoping and praying that my dear brother will again return home well, that father and mother will soon recover their health, that this will reach you all in best of health, and that this unhappy war will soon come to an end, I remain as ever

Your sincere brother-in-law."

On May the 8th, 1916, defendant, Joseph Woerndle, wrote a letter in German to Mr. Donatus Woerndl, as follows:

"May 8, 16.

Mr. Donatus Wörndl,

1 Bav. Reserve Army Div.

1 Bav. Reserve Dis. Regiment No. 12.

My dear Brother:

I wrote to you often since you were inducted into the army, but it seems that my letters do not reach you, but I shall try once more to get this to you.

One's blood stagnates, reading of the horrors of the war, and I cannot understand how the Almighty God allows that so many human lives daily, yes hourly, are permitted to be butchered. I pray every day at every opportunity that this terrible and unhappy war would cease, but as it seems in vain. We here in spite of all reports cannot have an idea of the misery which now exists in Europe. Neither have I ever received any word from you, if you have ever written, and I am very much worried that nothing will happen to you. I cannot escape a shudder when I ponder over the situation, and yet it seems that fate wills it so. I cannot understand that the stupid French cannot see that they are in vain sacrificing their sons to salvage damned England's chestnuts from the fire. And that our country too should offer herself for cursed gold to furnish tools of murder to blow hundreds of thousands of human lives out of ex-

istence. We protest, telegraph, argue, and do all we can, but all our efforts seem to have no effect upon the Administration in Washington. And an end not yet in sight. Our can never repair for the curse of his deeds, for it seems as if he has sold his soul and body to the devil and his ally England, and it looks as tho he were lending every effort to throw our country into this war. But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the bloodbath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe. This monster of a president seems not to notice the bloody handwriting on the wall, but it will be that much more red when the hour comes, and he should persist to throw this country into the mouth of inhumanity and war. I hope it will not come that far and that the good own common sense of the American people will not leave them at this hour. Dear Brother, write to me how everything looks and how you are, for I would be glad to hear from you. I have raised your allowance to Mk 100 per month to the conclusion of war, and I hope that it will get to you promptly. I feel very sorry for your wife and your small children as well as Kaspar and children and for Father, in fact all concerned and hope that this butchery will soon

come to an end. The whole world admires the Emperor, for he is perhaps the greatest man that ever lived, the ablest soldier, diplomat and ruler, and I hope he will succeed to lift the world back upon its axle. If he can't do it, nobody else can.

And now, dear Brother, remain true to your flag and your fatherland, do not lose courage and God will never leave you. I will do everything in my power to help at home and otherwise.

#### GOD WILL NOT DESERT THE GERMANS

Pray for me so I may remain well and be able to help you, and I am willing to sacrifice everything to contribute my mite in this dreariest time and hour in order to alleviate the misery of the unfortunate and suffering. And now, my dear Brother, I shall have to close for this time. It is already past 11 o'clock and I have several letters to write yet. I have sent my family to the beach a week ago because my two youngest boys had the whooping cough and nothing would help, and hence the Doctor advised change of climate. We are only about 118 miles from the coast and I can get there every Sunday by fast train. The trip takes 5 hours, but I can spend the day with them.

With hearty greetings to you and your comrades, and hoping to hear from you soon, I remain  
as ever

Your loving brother.

P. S. Your wife sent me a soldier's photo of you, which I heartily enjoy."

On July 14th, 1916, defendant, Joseph Woerndle, wrote a letter to Mr. H. W. Boehme, as follows:

"July 14.

Mr. H. W. Boehme,  
Kurfuerstendamn, 100,  
Berlin-Halusee,  
Germany.

My dear Mr. Boehme:

I have received two of your letters and I have answered both of them previously, but it seems that neither of my letters came into your hands, however, both of my previous letters did not touch upon your business affairs very much, as I had no chance to get up a complete report which I now submit. I have had a talk with the Ladd & Tilton Bank in reference to your note and have found that no part of the principal of \$500 has been paid off, although the interest have always been promptly made. I have also called at the offices of the Northwest Importing Company and have had a talk with Mr. Bult several times. The Northwest Importing Company is still in existence but like a great many other concerns has just about kept above water, without counting, however, running expenses as far as the salary of



Mr. Bult concerns. Mr. Bult was very nice in showing me over the whole premises and the books. From said books, I find that on the first day of January, 1915, the business was charged with the following:

Assets:

|                           |          |
|---------------------------|----------|
| Ladd & Tilton Bank.....   | \$500.00 |
| Printing Bill .....       | 35.00    |
| Portland Brewery .....    | 25.00    |
| McCondrey Bros. Teas..... | 36.40    |
| Livery .....              | 56.00    |
| Fletcher, Teas .....      | 10.00    |
| Casswell, oils .....      | 55.00    |
| Burnett, Cash .....       | 40.00    |
| Paste Co. ....            | 20.00    |
| <hr/>                     |          |
| Total .....               | \$777.40 |

The outstanding credits amounted to \$700.00, plus fixtures and some stock. Against this is also charged your note of \$735.00 and owing Mr. Bult for salary balances \$125.

On January 1, 1916, the debits show:

|                             |          |
|-----------------------------|----------|
| Ladd & Tilton Bank.....     | \$500.00 |
| Neisson Company, oils ..... | 199.10   |
| Printing .....              | 10.00    |
| Portland Brewery .....      | 25.00    |
| McCondrey Company .....     | 90.00    |

|               |          |
|---------------|----------|
| Livery .....  | 67.00    |
| Caswell ..... | 55.00    |
|               | <hr/>    |
| Total .....   | \$824.10 |

Plus note H. W. Boehme, \$735, account Bult, back salary balances \$180.00. Outstanding credits credited against this \$739.00.

On the 14th day of July, the date of this writing, I find the following charges:

|  |          |
|--|----------|
| Ladd & Tilton Bank.....                      | \$500.00 |
| Niesson & Co. ....                           | 119.10   |
| Portland Brewery .....                       | 25.00    |
| George Harvey, Loan Broker,<br>3% P. M. .... | 100.00   |
|  | <hr/>    |

Total .....\$824.10

The outstanding accounts amount to \$807.00. Besides this is your note of \$735.00 and accumulated salary balances of Bult in the sum of \$330.00.

The net profits for 1916 are as follows:

|                |         |
|----------------|---------|
| January .....  | \$96.25 |
| February ..... | 55.19   |
| March .....    | 91.16   |
| April .....    | 109.00  |
| May .....      | 96.25   |
| June .....     | 61.85   |

The above, however, are not embracing Mr. Bult's salary; hence, every month except April

shows a loss. Mr. Bult now pays all cash and owed nothing for coffee. The rent has been reduced to \$30.00. This gives you a clear idea as to the conduct of the business. There has been paid in by Alma Raleigh, the sum of \$60.00, which is held subject to your orders and here on deposit. Incidentally I may say I have received in your first letter a check for \$10.00, Attorneys fees. This is the sum I have heretofore acknowledged, but perhaps you have not received my letter.

In reference to your lots I would say that the bank still holds title to the same as to the equity on the acreage in Lents. I have taken up the matter with Mr. Bult, but as he was not in a position to get me the deed, I have withheld the same and now still withhold the contract. I am afraid however, that since no payments have been made on the contract, same has ceased to exist as an asset. I am of the belief, however, that one can get title again by paying up back installments. Your other goods I am having in my safe-keeping as before. So much for the business end of this communication.

Your last letter I have received from Salt Lake City, was written on an Underwood Typewriter. Strange isn't it. I have too, sometimes wondered at the report that you was within the boundaries of our state, but I am inclined to believe that you

would have called, had you been here. But never mind, when this horrible butchery in Europe is over, you may be able to tell me all about it. Just yesterday we received the news that the German submarine "Deutschland" has arrived in New York. You can imagine the joy among the "hyphenated", although the news from the front are somewhat discouraging of late. However, I hope with the prayers of the millions within the confines of this beautiful country, the victory will go where it belongs and the poker chip stake of the proud Albion will twindle down, with the aces of the deck all in Wilhelm's hands. Even the most faint-hearted have a ray of hope, with the first days of the far and long heralded offensive of the allies simmering down in significance no matter what friend or foe may think of German militarism and the Kaiser's "Me and Gott". No human being has ever guided the destinies of that country, like Wilhelm. It is a struggle long and hard but with the faith, confidence, loyalty and endurance, the outcome of the struggle is not in doubt. We are here doing our best. We are filing scores of protests against the unneutral (seemingly at least) acts of our Government, and in a small degree, I suppose they have had a bearing upon the relations had in the past with the country across the water, second dearly loved by us all. However,

we have not achieved that which from a Christian humanitarian and civilized standpoint, we considered expedient and proper. We have been compelled to see German dollars, intrusted to our banking institutions, swell the war loans granted by J. P. Morgan and his crows, unable to help ourselves or to stop the banks from so doing, and the present predicament shows us how important it is for the German speaking people of this country and their descendants to rally to the banner of true Americanism, i. e., to guard our interests, first, last and always as American citizens only, and not to foster English enterprises and bolster up their half bankrupt country. I am somewhat sorry to notice that the allies have again gained an inroad into the German lines of defense, but hope that these gains are only temporary and that they will exhaust themselves before they will reach their goal. I would be pleased to receive from you news as to conditions existing at present in the dear old Fatherland.

Do you in your travels ever get near Rosenheim, Bavaria? My folks live at Bernau am Chiemsee. They would be glad, I am sure, if you could say "Hello" for me. If there is anything I can do for you in any shape, let me know. Often wished I could go home and do my share, to help carry the burden, but I presume I can be of greater use



right where I am.

Hoping to hear from you soon and submitting my kind wishes, I am, believe me, as ever,

Sincerely your Friend.

W/B"

On September 15, 1917, defendant, Joseph Woern-  
dle, wrote a letter in German to his father, as follows:

"September 15, 1917.

Mr. Kaspar Wörndl,

Bernau a/Chimsee, Oberbayern, Bayern.

My dear Father:

At last I have succeeded to discover an address to have a few lines reach you. I have not heard from you for over one year and the uncertainty regarding yourselves drives me nearly crazy. The enclosed letter was the last one I wrote, but like another one written prior came back to me. We are already since last March, tho indirectly, in this butchery, and no end is in sight yet. I hoped in vain that the peace proposal of the Holy Father would bring the long sought peace, and yet the whole human race prays for an end of this butchery. How long it will last yet only God knows. About the terrible suffering at home and other-wards in Europe we have probably no idea, but what may come here only providence holds in hands. A week before the outbreak of the war I

have sent you thru the Transatlantic Trust Co. in New York \$250 or about Mk 1200, but do not know to this day if you have received it. I paid for telegraphic remittance, but no return report ever came. How are you and are my brothers yet alive? The thought about them and their children and wives nearly takes my senses. How is your health? I hope and pray to God every day that he may spare you for us. If this unfortunate war is once over and I have the means, I hope to come out to you for a visit. Who and how many of my old comrades and acquaintances have already fallen? Are there yet any people left? Write to me, dear Father, and address the outer envelope either to "German Aid Society, Stockholm, Sweden," or to "American Red Cross, Stockholm, Sweden." The inner envelope which contains my letter must have my address on the outside.

Otherwise I am getting along fairly well. Business is on the dogs entirely and how everything will end I have no idea. If you write to me, dear Father, do not forget to paste an international postage stamp on the envelope addressed to me. And, dear Father, write without delay. Hoping that this letter will find you all alive and well, and with kind regards to you all, I am

Your ever grateful son."

That some time after January 3d, 1916, and prior to

July 14th, 1916, Joseph Woerndle received the following letter:

"Lillie, France, Jan. 3, 16.

My dear Woerndle,

I wonder, if you ever have received any of the letters, I have written to you from various places. I have my doubts about it, as our dear friends, the English, particularly late, rifle even the neutral mail bags rather thoroughly. I have an opportunity of sending these lines through a private party to the dear old U. S. and hope, that they will get safely into your hands. No message from you ever reached me and I believe, anything you may have written, rests safely at the bottom of the ocean.

Is the Northwest Importing Co. still in existence? When I left the Co. owed Ladd & Tilton \$400.00, for which this bank was holding as security, my deed to 4 lots in Portland; according to the agreement the loan should have been paid back long before this—I wonder, if this has been done? The deed should have been returned to you by Bult. If it has not been turned over to you, will you be kind enough, to take the matter up with Bult. The N. W. Imp. Co. further owes me personally \$735.00, for which amount a note should be in your hands. This note I had, at my departure from Portland, given to friend Klein

of the Hoffbrau as a security for a certain loan. The latter has been paid back by me about a year ago and my cancelled check to Klein is in my possession. Klein was requested, to turn the note over to you. The N. W. Imp. Co. should have begun long ago, to pay at least \$25.00 per month on this note. Will you look after that too? So much for the business—

As to me personally I got through so far with a whole skin, and am feeling splendid. I am captain, detailed to the General Staff and "Ritter des eisernen Kreuzes". My wife and children are very well, the little fellows speak German fluently, and Madam is still overwhelmed by the greatness, the enormous strength, the silent unconquerable power of Germany. As to the end of the war, nobody can predict, when that will be; as to the outcome, there is no doubt; WE HAVE WON! Our armies are standing, an unbreakable wall of iron, in the enemies' countries, we have everything we need, now or in the future, Serbia is completely eliminated, so will Montenegro be, the Allies at Gallipoli are no longer to be reckoned with, Albania will be taken, the English and French will be thrown out of Saloniki, and even if we should return every foot of conquered territory in the East and West (remember: we are not carrying on a war of conquest but a defensive war, into which

we have been forced!) our victory will be great and far reaching, for the ring of our enemies has been broken forever, we are standing hand in hand with our friends and the road to the Persian Gulf is open, a fact, which will be of the greatest consequences! The German total losses are smaller than the French losses alone, of our wounded 92% return to the front. In the battle of the Champagne the French lost 250000 men, the English at Loos 60000 and we—between 35 and 40000 men!

The English—and they know it themselves!—are in the position of a business man, who has ventured the bulk of his fortune in a great enterprise, which turns out to be a losing proposition, and who is now compelled, to throw the remainder of his fortune into the gap, in the vain and hopeless attempt, to turn the tide in his favor. It is too late! they are beaten, but, of course, they cannot admit it as long as there is still a hope of getting some new fool to get the chestnuts out of the fire, and—the English always have been willing to fight to the last Frenchman!

It is really almost pathetic, to see, to what means they have to resort, to keep up appearances for at least some time to come; no means are too low, no lies too brazen! Since the Belgian and other atrocities do not work any more, I should not be surprised, if they would try, to tell the



American people, that Germany will, after this war is over, tackle the U. S.! Anything, to poison the mind of the Americans! We know, of course, that the big papers, owned or in the pay of the English, do not represent the actual sentiment of the people in the U. S., though we realize, that there are also many people, who would be immensely pleased, if an American citizen could be placed on each English ship, to save the English navy from our submarines. One could be surprised, why certain people have not hit upon the idea of placing, board and room free, some American citizens in each trench of the Allies and telling us, "Don't you dare, to shoot this way, here are Americans"! Just imagine, in what fix this would put us Huns and Barbarians! Why, in the name of all common sense anyway, do we object to being blessed with Kossaks, Senegalniggers and colored Englishmen's civilization!!

Well, duty calls! Sincerest regards to all, who remember me.

Faithfully yours,

H. W. B.

Berlin-Hallensee

Kurfuerstendamm, 100,3.

LESTER W. HUMPHREYS,  
Solicitor for Plaintiff.

C. T. HAAS,  
Solicitor for Defendant.

AND AFTERWARDS, on the 17th day of April, 1922, Hon. Robert S. Bean filed in said court and cause his opinion as follows:

### OPINION

BY BEAN, D. J.:

This is a suit brought under Section 15 of the Act of June 29, 1906, 34 Stats., 596, to set aside and cancel a certificate of naturalization issued to defendant by the Superior Court of the State of Washington for Pacific County in August, 1904, on the ground that such certificate was procured by fraud in that the defendant, a native of Germany, falsely and fraudulently swore that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate and sovereignty, and particularly to the Emperor of Germany of which he was a subject, when in truth and fact he fraudulently reserved and kept in whole or in part his allegiance and fidelity to the Imperial German Government. The material allegations of the complaint are denied by the defendant.

The question at issue is defendant's attitude of mind in 1904 and whether he obtained his certificate of naturalization illegally by false and fraudulent representations as to his true allegiance. In determining that question reference may be had to evidence showing his attitude of mind and heart subsequent to his naturalization (U. S. vs. Wursterbarth, 249 Fed.

908; U. S. vs. Darmer, 249 Fed. 989; Schurman vs. U. S., 264 Fed. 917; U. S. vs. Kramer, 262 Fed. 395; U. S. vs. Herberger, 272 Fed. 278); but, as said by Judge Hunt in Schurman vs. United States, 264 Fed. 919:

“Courts should be very careful to avoid depriving one of citizenship upon evidence which, while proving lack of allegiance at the time of the investigation, may not by relation establish that there was lack of true faith and allegiance at the time of the issuance of the certificate to the applicant.”

The defendant was born in Bavaria in 1880. When seventeen years of age he obtained from his native country a certificate of complete expatriation and came to the United States with the intention of making it his home. He has since continuously resided here and so far as the evidence discloses has, with one exception hereafter noted, been an industrious, upright and law-abiding citizen.

A short time after his arrival he filed his declaration of intention to become a citizen and on August 23, 1904, made the necessary proof and was regularly admitted and took the oath of allegiance. About a year later he married a woman born in the United States and has three children. Neither his wife or children understand or speak the German language.

There is no evidence of any conduct, acts or declara-

tion of the defendant prior to the commencement of the war between Germany and England which in any way tends to support the allegations of the complaint. But it is contended by the Government that defendant's attitude during the latter part of 1914 and the years 1915 and 1916 was such as to show by relation that he swore falsely in 1904 when he declared that he absolutely and forever renounced all allegiance and fidelity to the German Government.

The evidence relied upon to sustain this position consists of information obtained from private memoranda of defendant and copies of private letters written by him to his relatives in Germany, which were obtained by an unlawful search of his home and office by officers of the Government in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and which documents on his application were by the court ordered returned to him, without objection by the Government. The evidence so obtained would not be admissible on a criminal trial (*Silverthorne Lbr. Co. Inc. et al. vs. U. S.*, 251 U. S. 385; *Gouled vs. U. S.*, 255 U. S. 298; *Amos vs. U. S.*, 255 U. S. 313), and I am in doubt whether the Government should be permitted to profit in this proceeding by the knowledge so obtained.

But, however that may be, it is not sufficient in my judgment to show that the defendant did not, in 1904, honestly and in good faith renounce and abjure alle-

giance and fidelity to Germany. It all relates to his acts and statements in private letters and memoranda after the commencement of the war between Germany and England and several months prior to the time the United States became involved therein. It should be interpreted in the light of this fact and not that of subsequent events. There is no evidence of a single act, statement, or conduct indicating allegiance to or sympathy with Germany after the entry of the United States into the war, but all the evidence is to the contrary. I have not been referred to a case in which a certificate of naturalization has been cancelled and set aside upon such proof, nor have I been able to find one.

In obtaining a passport in his name for use by Boehme and in allowing Boehme to use such passport and to assume and travel under his, defendant's name in order that he might pass the Allied lines and return to Germany and join the German forces, defendant's conduct is, of course, indefensible; but there is no evidence that he knew the passport was to be used, or was, in fact, used for any other purpose, and his action in reference thereto is not sufficient to show a fraudulent reservation of fidelity to Germany at the time of his admission to citizenship ten years before.

The same may be said of the statements of his private letters to members of his family in Germany criticizing the policy of the United States, expressing love



for his native country and a desire for her success. They were all made some months before the United States was at war and at a time when his native country was being hard pressed by her enemies. It is common knowledge that during that time many naturalized citizens born in one or the other of the belligerent countries were in sympathy with the land of their birth and anxious for her success, and not only publicly so expressed themselves, but in other substantial ways aided and assisted her, without their loyalty to their adopted country being then or thereafter called in question.

It follows that the complaint should be dismissed and it is so ordered.

AND AFTERWARDS, to-wit, on the 17th day of April, 1922, a decree was duly entered in said court and cause as follows:

### DECREE

This cause was tried by the court upon the pleadings and the proofs, plaintiff appearing by Mr. Lester W. Humphreys, United States Attorney, and defendant in his own proper person and by Mr. C. T. Haas, of counsel. Upon consideration whereof

IT IS ORDERED, ADJUDGED AND DECREED that the bill of complaint herein be and the same is hereby dismissed.

(Sgd.) R. S. BEAN,  
Judge.

AND AFTERWARDS, to-wit, on the 23rd day of September, 1922, a statement of the evidence in said cause was duly approved by the court and filed in the office of the clerk of said court as follows:

### STATEMENT OF EVIDENCE

The evidence given at the trial of this cause was as follows:

Defendant, Joseph Woerndle, was born at Bernau, Bavaria, Germany, August 3, 1880, of German parents; said defendant emigrated to the United States, sailing from Bremen, Germany, in July, 1897. The said defendant, Joseph Woerndle, at the time of his hearing in open court on his application for naturalization on the 23rd day of August, 1904, in the Superior Court of the State of Washington, for Pacific County, and as a part of defendant's naturalization proceedings, declared on oath before the said Superior Court of the State of Washington for Pacific County that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly to the Emperor of Germany of whom he was a citizen or subject and then and there took oath in the prescribed form, that he would support the Constitution of the United States of America.

In October, 1914, one Hans W. Boehm was subject to call in the German army; that from February,

1914, until the 6th of October, 1914, the said Hans W. Boehm resided at Portland, Oregon; that in October, 1914, and particularly from October 1st to October 6th, 1914, the defendant, Joseph Woerndle, was personally acquainted with said Hans W. Boehm and that said defendant then and there knew that said Hans W. Boehm was a citizen and subject of Germany and subject to military service of Germany, and that said Hans W. Boehm was then and there desirous of departing from the United States and returning to Germany to enter the military service of Germany.

Prior to the 3rd day of October, 1914, Boehm discussed with Woerndle, Boehm's desire to return to Germany and join the colors.

On the 3rd day of October, 1914, by agreement between Hans W. Boehm and defendant Joseph Woerndle, an application for a passport for Joseph Woerndle was executed, thereafter the name "Joseph Woerndle" was signed to the said application by the said Hans W. Boehm and the passport being intended for the use of Hans W. Boehm. Whereupon Hans W. Boehm with the knowledge and consent of the defendant, Joseph Woerndle, transmitted the said applicaiton for passport to the Secretary of State of the United States of America, with directions that the passport be sent addressed "Joseph Woerndle, c/o Waldorf-Astoria Hotel, New York City." Defendant, Joseph Woerndle, then and there delivered to said Hans W. Boehm a certified

copy of the certificate of citizenship of defendant Joseph Woerndle, and an original patent for land in California to be used by the said Boehm in identifying himself as Joseph Woerndle.

On the second and third of October, 1914, the defendant, Joseph Woerndle, made the following entry in a diary on page 109 thereof:

“Had a grand dinner with Paul Wessinger  
\* \* \* and H. W. Boehm. \* \* \* Boehm says  
he intends to return to Germany and join the col-  
leurs, and wants to give me power of atty and  
make will.

“Boehm gave me power of atty. and drew will.  
I will furnish him with pass—& U. S. citizen pa-  
pers so he can travel in my name. Also gave him  
my California land patents for identification. In-  
structed Secretary of State to forward pass when  
made out to my address c/o Waldorf-Astoria,  
New York, where Boehm will call for it. Out  
with Paul Wessinger. Wessinger signed my ap-  
plication for pass as witness, saying he knew me  
8 years.”

On the 6th day of October, 1914, Hans W. Boehm left Portland, Oregon, went to the Waldorf-Astoria Hotel at New York City, there asked for and received the passport issued to Joseph Woerndle on the afore-  
said application of October 3, 1914, and the said Hans

W. Boehm thereafter used the name and passport of Joseph Woerndle, traveled to Europe and thence forward, was active in the German military service while pretending to be Joseph Woerndle, an American citizen.

In February, 1915, Boehm applied for a further passport, using the name Joseph D. Woerndle and the photograph of Boehm. He also signed as attesting witness the name of Joseph D. Woerndle to an application for passport, for one Anthony J. Brogan, all of which, however, was done without the actual knowledge of the defendant Woerndle.

In January, 1917, Boehm was traveling under the name of Jelks Leroy Thrasher, with a fraudulent American passport, also without the actual knowledge of the defendant Woerndle. At that time he was arrested by British authorities at Falmouth, England. The fact of Boehm's arrest and the fraudulent nature of his passport was reported to the State Department of the United States Government by the American Ambassador at London. On the first of February, 1917, the news of Boehm's arrest was published in the Portland "Oregonian" as follows:

#### "PASSPORT CASE PROBED

#### EXTRADITION OF CAPT. BOEHM IS CON- SIDERED

All Persons Connected with Issuance of Papers



to German to be Called to Account  
by Washington.

Washington, Jan. 31.—State Department authorities today began a thorough investigation into the issuance and alleged improper use of American passport in the name of Jelks Leroy Thrasher, with which Capt. Hans Boehm, said to be a German Army officer, was traveling from Spain to Holland, when taken off the steamer at Falmouth and placed under arrest by the British authorities.

Work also was begun on new passport regulations which will be issued in a few days to throw further safeguards around their issuance and to prevent their use improperly.

All persons connected with the issuance of the Thrasher passport either have been or will be called to account by agents of the Department of Justice.

Legal officers of the government are looking into the question of extraditing Capt. Boehm to the United States."

On the 2nd of February, 1917, a further news article concerning Boehm was published in the Portland "Oregonian" as follows:

"BOEHM KNOWN HERE  
MAN HELD AS GERMAN SPY IS FORMER

PORTLAND MAN. WIFE'S RELATIVES HERE

Position Held With Hotel and Several Clubs in City and Partnership is Still Held in Business Enterprise.

Capt. Hans Boehm, who is accused of traveling as an agent of the German Government with an American passport bearing the name of Jelks Leroy Thrasher, and whose case is undergoing a rigid examination by the State Department at Washington, is well known in Portland.

Capt. Boehm has been arrested by British agents and is now at Falmouth, where he was taken after being transferred from a neutral ship while on his way from Spain to Holland. He is suspected as a spy and the State Department is considering his extradition.

Capt. Boehm is a brother-in-law of Mrs. H. L. Froggett, of the Parkhurst Apartments, 260 North Twentieth Street, and left Portland a few months after the beginning of the war.

Clubs Procure Services.

He lived in Portland for several years. He was first connected with the service department of the Hotel Portland. Later he went to the Arlington Club, where he was manager. When the University Club was opened he served that organization

and was later manager of the culinary department of the Commercial Club.

He married Miss Helen Willis, whose parents reside on a farm near Dillars, Oregon, and Mrs. Boehm and their two children are now living within an hour's ride of Berlin.

It is understood that Capt. Boehm resigned from the German army some time before the war broke out but was reinstated in time to respond to the call issued for all German reservists. At the time he received word he was to go he was on the Willis ranch, says Mrs. Froggett.

#### Many Countries Visited.

It is said that Capt. Boehm has visited most of the neutral and belligerent countries since leaving Portland. Portland friends have received anonymous cards occasionally, believed to have come from him.

He owns a half interest in the Northwest Importing Company, 224-226 Ankeny St., the other member of the firm being A. E. Bult.

The parents of Mrs. Boehm have received letters from her within the past few months although there was apparently no information as to where Capt. Boehm was. Mrs. Froggett said yesterday she had not heard from her sister since July and that she knew nothing of the activities of Capt. Boehm since he left Portland.

Capt. Boehm's family did not leave Portland until some time after he had gone."

The foregoing newspaper items were read by the defendant Woerndle, who realized the enormity of his offense in connection with the Boehm passport of October, 1914, and for that reason cut from his diary the entry of October 2nd and 3rd heretofore quoted. This entry was originally written on page 109. Early in February, 1917, Woerndle re-wrote on page 199 of the book in which he kept his diary, an entry under date of October 3, 1914, and pasted page 199 in his diary on the stub from which he had cut page 109, said substituted re-written entry being as follows:

"Had a grand dinner with Paul Wessinger  
\* \* \* and H. W. Boehm. Maybe I can't go  
with Boehm after all, but he says he will go in  
spite of hell. I only pity my poor father but then  
my own family and children. Cecelia does not  
want me to go and maybe I won't, but I can't  
just stay. At any rate I will get my pass-  
port in shape so as to have that part ready if I  
should decide to go. Wrote to Sec. of State to  
forward my pass to Waldorf-Astoria Hotel where  
I will call for it. Boehm urges all he can for me  
to go with him. Maybe I will but there will be a  
surprise when I am gone."

On the 31st of May, 1915, defendant Joseph Woern-

dle wrote to one Hoerner a letter in German as follows:

5/31/15

Mr. Dear Mr. Hoerner:

Reading the news as they come over from all sides, I am overcome with a feeling of sadness, and as it now seems, and judging from today's evening paper headlines, only God Almighty can save us from war with my own Fatherland. It seems now as if the American Government has lost its head or is about to lose it. What will all happen if this takes place is hard to imagine. One shudders by the thought. The good, beautiful land where my cradle stood, poor, poor, Germany. The sword in hand it is now fighting nearly against the whole world. I shudder at the thought. What will all yet happen and what will be the outcome. Sad enough that our Government supplies the English ragpack and others with shiploads of ammunition, but wants now also to declare war on Germany. Almost unbelievable, and yet it may come to pass. For for Germany to do what the Government here demands is unthinkable, because should they do that and call off submarine warfare, they may just as well ask for peace, for many hounds are the hares's death. But I hope it will not come that far. I cannot conceive how it is



possible that Germany has held out this far, without provisions and soldier supply from without. And yet I expect and hope that Germany will come out victorious. How that is possible I cannot imagine, but she will and must be victorious. What is the consensus of opinion in Germany since now too Italy, the mutinous and treacherous brute, has drawn the dagger against Germany? How long is it possible for the supply of soldiers to last? I take from this evening's paper that the last reserves have already been called. Is this true? One cannot believe the local papers very much, and the German which now and then come over are already a month or two old when they get here. The whole matter is so immensely sad, with a solution not yet in sight. I received again yesterday newspapers from you, for which I thank you very much. I will send you from time to time newspaper clippings and newspapers so that you will also be posted about local happenings. My youngest brother was already drafted last January. Has 5 children and a wife. Horrible, if one thinks about it. Maybe the same will happen to us here. People here as it seems, are about to lose their whole sense, and it is hardly believable, that a country like ours, which has trumpeted out into the world the call of freedom and the protection of the weak, has stepped so

low as to support a bloodstained, treacherous people like England, as it is now doing. But penalty will not remain away, and our neat Government will yet perhaps bitterly regret all. Him whom the Lord wishes to destroy, he smites with blindness, and the whole Wilson-Bryan Kraut will have a frightful responsibility for the millions of human lives destroyed thru our bullet manufacture. Write me please occasionally as to the true conditions and what you tihnk of the future.

With hearty greetings to you and your good family, I am most respectfully,

Your devoted

(Sgd.) Joseph Woerndle."

On the 14th day of May, 1915, defendant, Joseph Woerndle, wrote a letter in German to his parents as follows:

"May 14, 1915

Dear Parents:

Since I have not heard from you for a long time I take that my last letter to you has been lost. I set myself today again on the machine in the surmise that this perhaps will be the last letter for some time which may reach you. Judging from present conditions this country too will be involved in a war with Germany, loved, poor, unfortunate Germany. Haunted and persecuted by the

whole world, under all possible excuses made, belied and invented. What the outcome may be is a riddle, but at any rate the whole world will rise in rebellion and when everything will be over, there will not be very many people left. What bullet and sword will not take, pest and collera will claim. It is horrible to think about it. And yet we have here in the land of plenty no conception. If I were out there today as 3 years ago, I would without hesitation sacrifice my all for loved old fatherland, for now for the first and perhaps the last time Germany is depending on all help from child to dotard to save it from the claws of its archenemy, England and its allies. I learn with shudder of the colossal sacrifices which Germany now makes and its people, but it is better, a thousand times, to die the death for Fatherland than to eke out an existence in the shackles of the most sordid nation on earth, England. Were it not for my family here, I would have long ago returned to my old home to aid it in this time of greatest need, but as it is, such a thing is not possible. And Italy too will join the English, French and Russian hordes, and therefore will hope to be put to a severe test. Times here are hard for many, for labor conditions are not the best, and thousands of people are out of employment, but we have nothing to complain, when one consid-

ers the misery of thousands, yes millions, who now have to suffer in Europe. Has Donat been drafted already? Hopingly not, for it would be horrible for his family. But perhaps nothing can be done. The Americans, moblike, would be glad if it could get one over on Germany, but the German Michael will not have to be afraid very much. The United States are noisy, but when it comes to do something they are slow. This nation could not force ragged Mexico to salute the American flag. They will not risk to go to Germany, otherwise the Japanese may soon take possession of the best part of our coast, for they have aimed for it a long time. Our good President keeps shop open whenever it goes against the Germans, but whenever the English are guilty of anything, he is mum and blows the trumpet of peace. It fills me with sorrow if our beautiful country should be drawn into this sad war, for the will of the masses and of the more sensible classes is not for it, but if it cannot be helped we will have to go to it, at least financially. Few Germans will shoulder arms, and of the others not many will put their head in front of a Howitzer and hence perhaps not everything will be lost at once. I am only sorry for the many human lives, but I may say to you, preserve to the last man for as I hope vic-

tory will yet go to the Germans.

Father, I would like very much if you would give Kaspar from allowance monthly Mk 10. I will instruct the German bank to send you monthly Mk 60. It will be awfully hard for poor Kaspar now, and this little gift buys him now and then a quart for his recuperation.

I am always very busy and work almost day and night. But there isn't much pay in it for the people have no money. I have bought me a little farm about 6 engl. miles or 2 hours west of Portland. 25 acres with house and barn. In my auto I get there in 20 minutes. Wish you could be here with us on the "Farm." During vacation we will all move on the place. Running water, good soil, beautiful view with the lights of the city in sight.

We have beautiful weather and everything is in full blossom. The roses are all out and I fear there will not be any left for our rose carnival in June.

And now, dear Father, I will close for this time. I hope for the best, and hope that everything will pass over and that God may grant victory to Germany.

Write to me often, even if you do not get any letters from me, for half of the letters get lost.

Pray for me that I may remain well so that I can always support you.



Greeting you all heartily, I remain as ever  
Your grateful son."

On the 31st day of May, 1915, defendant, Joseph Woerndle, wrote a letter in German to his brother Kaspar as follows:

"5/31/15

Dear Brother Kaspar:

I shall again try to write you, thinking that this letter may reach you. How it now looks at home I have no idea, since Italy too, the treacherous, mutinous pack has declared war on Germany and Austria. It is horrible to think about it, and the outcome makes one shudder. Has Donat already been drafted with wife and 5 small children at home. And it now seems as if this country too wants to declare war on Germany. Considering the great sacrifices this war has cost already, one can hardly understand that there are yet soldiers left, without new additions or other supply from without. One can only do one thing and that is to leave all to God Almighty. How many have already fallen from the village of Bernau? And how many and who is in captivity? What do you think the future will bring? Kaspar, I have received the deed from Notary Weiss. I had it executed here and filed with my papers with a note, that if anything happens to me that it shall be sent to you. Kaspar, I do not know if after

the war is over I will not return to the land of my cradle, and if I should do so would want to build a house on the place. I have three boys and these would perhaps be needed by my dear old Fatherland after the war. When the war is over I will know more how everything is. I have requested the bank at Munich to increase Father's allowance Mk 10 and requested him to give you Mk monthly so you can buy for yourself an extra little once in a while when you have to work hard. Write me how you are getting along and how your family is. Here everything is as of yore. Business is very poor and altho I always have my hands full, people have no money to pay. Enclosed you will find a picture of my recently acquired farm. It lies about 6 engl. miles from Portland, and I can reach it in about 20 minues in my car. I often wish you could be here with us for a while. We have beautiful weather and roses have already blossomed, so early have they come out this year. Write me again soon how everything is and all news which occur. Sending my hearty greetings to you, your wife, children and little Godchild, and also Father, Mother, Donat, wife and children, I remain as ever

Your devoted brother.

Clothes would now hardly reach you, but I will try once more to send you a suit of clothes."

On June 3d, 1915, defendant, Joseph Woerndle, wrote a letter in German to an aunt as follows:

"6/3/15.

My dear Aunt:

I received your dear letter just now and am very happy to have heard from you. I have written you twice already, but it seems that my letters have not reached you. I have not heard from you for a long time, and if you have written me, your letters did not get here. I am sorry your husband has such a disease, and there cannot be much hope. Expecially since he is so old. But then since there cannot be any hope, we must take everything in good grace. We have buried two weeks ago my dearest and oldest friend W. Lengauer to whom I first went when I came to America. He too suffered for the last two years from the same disease, and when he underwent an operation, he did not survive. I do not think that there is a cure except when a person sees to it in time. It is horrible about this war and the end is not yet in sight, and how it ends no one knows. I am ashamed of the action of the American government regarding Germany, for the people do not sanction these actions, but nothing can be changed. We do everything in our power to avoid the worst, but it's just like pouring water on a duck's back. But that America will be penalized for its double

standard I have no doubt, just like Italy. My younger brother will already have joined the colors, since he was already drafted last December. Kaspar, the older one, is at home yet, since he is employed in the Post Office and they perhaps need him badly. Neither have I heard from Father for considerable time, and as you can imagine, he is worried very much. If I were out there, I would also be found in the trenches or on the battlefield—dead—. For I would not stay away. We have just received the news that Przemysl is fallen and in the hands of the confederates. What happy news, but what against so many. We hope and pray that the Germans will win out in the end, but human strength only does not seem to make it possible. Now, dear Aunt, prepare yourself for the worst, for your strong constitution will prevail against it. Do your own thinking and work, rely only upon yourself and you will never be disappointed. If it should be possible for you to sell out, do so and invest your capital on interest, even if you have to lose a little, for you would avoid worry and cares, and you would get your money regularly. Naturally the relatives of your husband would have no further concern for you after he is gone, and for that reason you must be double careful. Otherwise I am getting along all right. That is, I am in fairly good health and my fam-

ily too. I am not earning anything for times here are miserable, and while we have a good practice, people have no money to pay for services. And now, dear Aunt, I shall close for this time. Have you the small cal. goldpieces yet I sent you some time ago? I wish you would have a picture taken of all the goldpieces I sent you and send me a picture so I would know exactly how many you are yet lacking. Write me again soon how you are and what happens. In the meantime I remain with hearty greetings to you and husband.

Your loving nephew."

On the 3d of June, 1915, defendant, Joseph Woernle, wrote a letter in German to an aunt as follows:

"6/3/15.

My dear Aunt:

I have just received your letter of April 26th and learn with sadness of the illness of your beloved husband, but hope he will soon be all right again. Only do not lose courage and everything will be all right again. It is indeed horrible about this disastrous war, and I hope it will soon be over. The American way of dealing is much to be regretted and the consequences will not remain away. Just now news reached here that Przemyśl was again conquered by the Austrians, which news naturally has caused considerable rejoicing among the Germans here. Otherwise everything is



friendly towards England as far as the press is concerned, but not the people. Our ruling powers are related by kinship with the English aristocracy and there is where the dog lies buried. Could Washington rise from his grave he would be ashamed of our present administration, which as it appears, will do anything to play into the hands of our archfoe, England. And too Italy, this low treacherous bank, has thrown herself into the arms of England. But she too will receive her reward for her high treason. Keep up hope, for God will righten everything, and Germany will and must be victorious. I have not heard from Father for some time and neither from my brothers. Donat was already drafted last December, and will no doubt be for some time on the firing line. And if I were out there, I would be found there too. And now, my dear Aunt, I must close for this time. Write me again soon and as often as you can for I always wait longingly for a letter from you. I wrote to you already a few times, but it seems all letters get lost. From you I have not received a letter for a long time. And now again hearty greetings to you and your dear husband. Hoping to hear from you again soon, I remain as ever your true, loving nephew."

On June 5th, 1915, defendant, Joseph Woerndle, wrote a letter in German to an aunt as follows:

"6/5/15.

Dear Aunt:

Your dear letter of March 28th has been received a short time ago, and I was real glad to hear from you. Yes, dear Aunt, it is horrible about this war, and an end not yet in sight. And now too treacherous Italy is gone over to the other side and it seems to me that when this war is once over there will not be much young manhood left. I am ashamed of the action of the American nation for they can never make reparation for it, and yet in spite of all efforts and work it seems that the labors of the Germans made no impression in Washington. Under separate cover I am mailing you a copy of my newspaper. My editorial (signed) just about illustrates the true situation here. You also notice my appeal for aid, but so much has already been collected from other sources, and the people on account of growing indifferent, are not donating very much anymore. I wish I had the means, I would be glad to give all to beautiful old Fatherland to aid it in this hour of need. The young population, I imagine, will not make a meager showing on account of the heavy losses so far. Yesterday we received news that Przemyśl again came into the hands of the Austrians and that the Bavarians have taken a heroic part in the assault. I only hope that the Italians

will get their neck broke for them and the English deserve the most. If I were in Germany as 3 years ago, I would gladly allow myself to be put in uniform, or otherwise be of benefit to the Fatherland. My younger brother perhaps has already been drafted, since he was last fall already examined and found able. With 4 or 5 children on his hand and a sick wife, this is to be regretted. Kasper perhaps cannot be spared by the postal authorities since they need him very bad. How everything will come out, God only knows. What do you think about it? Do you think that the Germans will be victorious? God grant it! Here everything is stagnant, and business is at a standstill. Wilson with his half bankrupt machine is trying to polster up with ammunition, powder and bullet trade his miserable stewardship, but he will not succeed and in one and one-half years he will be out. This monster will not again be reelected. And all in the most hypocritical fashion for "Humanity" and furthering of "Civilization". Such absurdity and hypocrisy. But he too will also get his reward. Perhaps after the war I will visit you, if only the climate were milder, but I cannot stand the cold weather. This is perhaps the last letter that I can send direct to you, for if I am not deceived, this country too tries to break with all force the peaceable relations with Germany, and if

once diplomatic intercourse is suspended, a declaration of war will not be far off. Then something may develop here of which we have no conception. And now, dear Aunt, God be with you, for all will come out all right. Write me as often as you can. With heartiest greetings, I am as ever

Your grateful nephew."

On July 26th, 1915, defendant, Joseph Woerndle, wrote a letter in German to Kasper Woerndl as follows:

"July 26, 1915

Mr. Kaspar Wörndl,  
Irschen, Post Bernau c/Chimsee,  
Bayern.

Dear Parents:

I have just received your letter of June 30th and learn with great sorrow that Donat had to move to the front and that he is already 3 months incorporated in the field forces. Glad, however, to know that he received a furlough if only for 14 days, and hope if he has to go again he will return safely. Learn with regret that Osterhammer, Joseph and Seiser, Peter have fallen. How did Peter get in the Hospital? As a wounded or otherwise sick?

I am astonished that you did not get any of my letters I have written you often. Naturally my

letters are not eventless and contents may not suit.

It is shuddering if one takes into consideration the many human lives which this war has already claimed, and yet will claim, but there is no turning back for Germany, for as a nation she would be gone if this war were lost. People here learn with admiration how the German people to the last man have collected around the flag and sacrificed the last drop of blood for the salvation of German honor and the German nation. A people like the German is not to be found in the whole world, and if one reads of the English labor strikes and the like, it fills one with disgust, tho it be to the advantage of Germany; but one can see of what caliber the English are made. Apparently their own soldiers and statesmen turn traitors for a few shillings. It is hard to think that millions of young people, fathers of families and too old men are falling victims of this frightful war, but as said before, now there is no room for consideration nor retreat. Forward and forward is the battle cry until the last hostile flag covers the dust. The stand of our administration regarding the German course, is mildly said, regrettable. There is no more neutrality or impartiality for the second American note to the German government shows without doubt that the American government wishes to paralyze the submarine warfare



so as to play in this way into the hands of Germany's enemies. How such a thing, considering the American war of independence with the same suppressor, England, is possible, is inconceivable and it seems that American gratitude is of short duration. How long this horrible war will last yet is perhaps better known to you than to us, and it will be only a question of who can sacrifice most people and mold most bullets. Perhaps with the taking of Warsaw a sudden change may take place, and war may be ended over night if Russia sues for peace. But this is only to be wished. France will perhaps stay in longest with England, but once Russia is defeated, it may come to its senses, which, of course, would end the war faster. And now, dear parents, I hope that this will reach you and that all will come out all right.

How many have so far fallen from Bernau? There must be now many prisoners in the Bag Experimental station. From what side are they, Russian, French or English?

Hoping to hear from you soon, I am as ever,

Your grateful son.

Hearty greetings to Donat, if he is still at home, and his family, Kasper and his family, as well as the acquaintances."

On November the 26th, 1915, defendant Joseph

Woerndle, wrote a letter in German to Kaspar Woerndl as follows:

"Nov. 26th, 1915.

Mr. Kaspar Wörndl,  
Bernau a/Chimsee,  
Oberbayern, Bayern, Germany.

My dear Father:

I received your letter of September 15th rather delayed, and read your lines with interest. I regret very much to know the Donat is still at the front, but hope he will return again healthy and happy to his family. I was rather astonished regarding the delay in the payment of your allowance, but this is perhaps due to postal interruption. I will see that in the future no such interruptions will occur. I can well imagine how everything goes with you, with the head of the family still at the front, and with the many children and Donat's sick wife. I have written her yesterday, which letter probably has arrived by now.

It is immensely sad to think of the misery which has come over poor Germany and other countries, with an end not yet in sight. Naturally here one has only an opportunity to get everything colored, and perhaps it looks darker here than in Germany, even in case of a victorious ending for the German flags. Since you have served two years in the war against France in 1870, you have perhaps a better

idea as to what the ending of this war may be. Do you believe that Germany's finances and manpower will last long enough to insure victory? We hope and pray to God that victory be to the German colors and that an early peace may be made. No doubt the French prisoners in your hands are faring better than your prisoners in France (and) or England, for the German heart is not so revengeful and cruel as the Frenchman's and I pity the fate of those Germans who have fallen in the enemy's hands. The letter of my sister-in-law was so touching, and I hope that the prayer of the little ones will be heard. I hope, dear Father, that in spite of your 70 years you will live to see the end of the war and the return of Donat as well as a reunion of us all. Take good care of yourself so that you will always stay well. I will see that with God's help my allowance will punctually come into your hands for the payment of possible help on the place.

Enclosed find my check for Mk 50 for Christmas presents, which I ask you to distribute among the others as last year. I am sorry I cannot make it more, but conditions here are not the best, but hope that later everything will come out all right.

Let me also know if the German Bank makes any deduction from the monthly Mk 60. The bank charges my account with postage which is

small, but I was just wondering if they pay you the whole sum in full every month.

Hoping that this will reach you, Mother, Sister-in-law and children, Kaspar and children, in best of health and sending my heartiest greetings to you all, I am

Your loving grateful son."

On November the 26th, 1915, defendant, Joseph Woerndle, wrote a letter in German to Kaspar Woerndl, Jr., as follows:

"Nov. 26, 1915.

Mr. Kaspar Woerndl, Jr.

Bernau, c/Chimsee,

Oberbayern, Bayern,

Germany.

Dear Brother Kaspar:

I received your letter of July 7th much delayed, but could not by reason of other things answer it right away. Your very explicit letter is welcomed because others were very short. Father with his shaking hand finds it more difficult to write than you. Yes, it is sad to think that Donat with his big family at home has to suffer all possible hardships in the enemy's land. But I hope that with God's help he will again return. In the meantime you will have to help all you can to keep everything agoing. How are you

and your family and little Godchild getting along? Would be glad to see you all but this cannot well happen now. Times here are not the best and tho our administration tries to avert a crash with ammunition trade, nothing, it seems, is going ahead. There is no blessing in things of this kind, and the thought that this country has to enrich itself on thus acquired bloodmoney is not less horrible, but retribution will here also be in its wake, and the proverb, "As won so lost," will also here hold good.

Regarding my piece of land would say that both of you can use it. Only agree with one another. If Donat got the hay last year, you can plant it with vegetables this year. It matters nothing to me and as long as Donat is away, it should not be difficult for you to use it. But, Kaspar, always remember that you have a salary, whereas Donat has to get everything from the farm. Do for one another what is possible, and I will try all I can to help along. I shall have the deed which you sent me acknowledged before a consul and will then send it to you. But, dear Brother, I am doing this so you have it on hand in case something should happen to me, which no one knows, but only in case of my death I want you to inherit this land. As long as I live myself I may need it perhaps to build a house on it and to live in it if



the Germans once should be chased out of here. Would not be regretted much for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left. How is everything otherwise out there. How many and who has fallen of the old comrades I used to know? Where is Donat? In Serbia or Russia? Send me letters once in a while which he has written to you and in which he described conditions. He has never written to me personally, perhaps cannot for reasons. What do you think of the future and the ending of this war? Write me again much and soon.

Sending hearty greetings to you, your wife, family and little Godchild, as well as to Father, Mother, Donat, wife and children, I am

Your true devoted Brother."

On December the 10th, 1915, defendant Joseph Woerndle, wrote a letter in German to Kaspar Woerndle, Jr., as follows:

"Dec. 10, 1915.

Mr. Kaspar Wörndl, Jr.,  
Bernau, c/Chimsee,  
Oberbayern, Bayern, Germany.  
My dear Brother:

Enclosed I send you power of attorney regarding transfer to you of property belonging to me in

Irschen, so that in case of my death you will have no trouble to get the property. In the meantime you and Donat can use it as you like.

I learn with great satisfaction from Father that Donat is yet alive and well in spite of the hardships of the war, and as it now looks, Germany has 3 Aces and England 1, with other Trump cards in Germany's hands. I expect eagerly every day the news edition, thinking that every hour may bring armistice and negotiations of peace, and yet that time is yet somewhat off. Victory for Germany too means much for us, for you have no idea how much the German population and business world under present circumstances has to suffer, for the end of the war and a German victory means the resurrection of German influence in the whole world and would without doubt help us here too immensely. It is only to be regretted that so many human lives are sacrificed to accomplish this and nobody here has thought that, after even unfaithful Italy has joined in the English, French, Russian, Belgian, Serbian, Montenegin and Japanese (and many others) alliance. It is almost unbelievable and sounds like a fairytale, hard to believe, and only God's help, faith, German unity, belief, hope and denials have made it possible to achieve victory over the whole world. Here we did our best with money, agitations, etc.,

etc., but with an administration as we have it, not much can be accomplished. Only last week we held a Red Cross bazaar, and netted over \$3,000, and thruout the whole United States people are busy working so that as much as possible can be done for the old Fatherland. I hope that the war will soon come to an end so that everything will again liven up and begin anew.

Sending to you, wife, children, Father, Mother, Sister-in-law and children my hearty greetings,  
I am, most respectfully,

Your true brother."

On January 20th, 1916, defendant Joseph Woerndle, wrote a letter in German to Kaspar Woerndle, Jr., as follows:

"January 20, 1916.

Mr. Kaspar Wörndl, Jr.,

Bernau a/Chimsee,

Bayern, Germany.

My dear brother:

I received your dear letter of November 22d, and observe that everything is going ahead tolerably. I also received a letter from my sister-in-law, Donat's wife, and I am immensely sorry to read of her plight between the lines. It must be horrible to know that he is now in the bloodiest angle of the whole war, where, as I consider it,

it is almost a miracle to return alive; but of course nothing can be done to change it. We are trying with all our strength to persuade our administration to stop the criminal trade in arms with England and France, but have no prospects of success. But hope it don't benefit the others because German submarines are sinking most of the ships.

Regarding the building of a house on my property in Irschen, I wish to say that until the war is over there are no hopes, for times here are bad and everything uncertain. In your place I would not ask to be removed to Munich at this time, for Father has now nobody at home. The building question is not a question of doing it, but a question of being able to do and under present circumstances, it is simply impossible. I would certainly like to see you helped in this regard, but for the present it is impossible to do.

I would like to get a photo from Donat in field uniform if one of them is obtainable. But I cannot write to him because my letters will not reach him and for that reason I would ask you to inform him of my wish and to send him my greetings, also my wish regarding photo.

Greeting you, little Godchild, wife and children, as well as Donat, wife and children, Father and Mother heartily, I am, as ever, with brotherly greeting

Your true brother."

On the 18th of February, 1916, defendant, Joseph Woerndle, wrote a letter in German to his father and mother as follows:

"February 18, 1916.

Dear Father and Mother:

I have just received your dear letter and also that of dear sister-in-law, and notice with great sorrow that you were visited with so much sickness this year. It seems I would not care to live anymore if you were taken from us. Father, pray that you remain well so that I may see you once more, only once, just once more. God will not take you from us, Father, so don't lose courage, and pray for me that I may stay well, in order to work so that I may give you comfort at least financially until this unhappy war is over. Take good care of yourself, Father, and too of Mother, for she too I want to see once more in this life, and also request of Mother that she pray for me, so I may get along well and be able to do for you much, much, very much yet. Everytime I take something in my hand which was given to me as a souvenir, I think of her. Tell her to take good care of herself so we can all see another once more. I have instructed the German Bank to pay you beginning with April \$100 per month



until the war is over, and of this money I wish for you to keep Mk 50, to give Mk to sister-in-law, and give Mk 20 to Kaspar every month. Poor Kaspar writes that he was sick and I feel very sorry that everything seems to go wrong, but hope with God's grace that everything will be better again. Never refuse the poor or hungry a piece of bread and God the Almighty will never forget us, even tho sometimes things don't look the best. The war will and cannot last long anymore because this butchery is frightful. It paralyzes my hand if I just think about it. Father, if it was necessary I would come out to help you at home and to take care of you until the war is over, for here things may get along without me, but if I can do more for you here, I had better stay here. Father, you have cared for us when we were small and helpless, you have worked day and night when we needed you, and now my dear Father I am ready to give my all to make the evening of your life as pleasant as possible. I am awfully sorry for Mother because she had to suffer so much, but God will spare us for her another joyful meeting. And this prayer goes heavenwards every day, with the prayer that nothing may happen to Donat and that he will again return happily.

Business here is very bad and I am working

almost day and night to keep above water, but I never lack optimism, and as long as a person has that, things go all right. Maybe we will make something in our mines this year and we have decided to get them in operation in the near future, since the price of asbestos has gone up.

And now, dear Father, I shall close for this time, and in the hope that this will find you, Mother, sister-in-law and children and Kaspar and family in best of health, and that the horrible war will soon come to an end, I remain as ever

Your grateful son."

On the 18th of February, 1916, defendant, Joseph Woerndle, wrote a letter in German to Mrs. Donatus Woerndl, as follows:

"Feb. 18, 1916.

Mrs. Donatus Woerndl  
Irschen, Post Bernau,  
Oberbayern, Germany.

Dear Sister-in-law:

I have just received your letter and also the letter of Father and learn to my great sorrow that you have all been visited with sickness. It pains me intensely that in spite of all the other misery you weren't spared of this visitation, but trust to the divine providence of our Lord and He will make everything right again. He never forgets

us if we do not lose faith in Him. I rejoice that much more since good Mother and dear Father are again on their way to recovery, and I hope and pray that when the next harvest comes this unfortunate sad war will be over. Although everything looks yet dark as the night, God will soon send us a ray of light, and the misery which poor Germany and its poor people withstood so faithfully and steadfastly will be turned into joy. Kaspar too writes he was sick and I cannot illustrate the profound sorrow I feel for you. I have instructed the bank to send you beginning April Mk 100 instead of Mk 60 every month and until this unhappy war is over and I have God's grace to send it. I would be glad to go over and help you at home if you think that I could do more for you in that way, but that is doubtful. Here times are miserable, at least out West. In the East things go somewhat better because the people have more work (perhaps in the ammunition factories). A shudder overcomes a person when one thinks that for filthy money millions of dollars worth of shrapnels are manufactured to slaughter thousands of young human lives. But all protestation appears to be fruitless. What visitations God Almighty reserves for us remains to be awaited, but we as Americans can surely expect no blessing for it. I hope and pray that Donat will return

home well. We have decided to reopen our asbestos mines in Eastern Oregon in which I own a little less than one-third interest, in a few weeks, and I wish for you to pray that we are successful. We own in all something over 120 acres, or an area of 600 feet wide and 6000 feet long. Alongside we hold a purchase option for 25 acres more rich asbestos land. The price of asbestos has gone up since the outbreak of the war, and I think the operation now can be made to pay. We also have acquired about \$2500 new machinery and I think we can compete against Canadian markets and competition. Asbestos is found only in Canada, Russia and only three places in the United States, of which ours is one. I am the President of the Mining Co., but do not concern myself with the mines themselves. The offices however are next to ours and under my direction. Debts we have none on the property neither on the ground nor machinery, but everything depends if we can sell the products at a price so as to make a profit, and this time I believe is at hand. After the war I shall send sample to Germany and perhaps supply the German needs and in this connection would make a trip to Germany. Will also send you samples later on.

And now, dear sister-in-law, I must close for this time, and altho it is already 9:30 P. M., I

have yet to write a few letters. My private correspondence I attend to evenings myself.

Hoping and praying that my dear brother will again return home well, that father and mother will soon recover their health, that this will reach you all in best of health, and that this unhappy war will soon come to an end, I remain as ever

Your sincere brother-in-law."

On May the 8th, 1916, defendant, Joseph Woerndle, wrote a letter in German to Mr. Donatus Woerndl, as follows:

"May 8, 16.

Mr. Donatus Wörndl,

1 Bav. Reserve Army Div.

i Bav. Reserve Dis. Regiment No. 12.

My dear Brother:

I wrote to you often since you were inducted into the army, but it seems that my letters do not reach you, but I shall try once more to get this to you.

One's blood stagnates, reading of the horrors of the war, and I cannot understand how the Almighty God allows that so many human lives daily, yet hourly, are permitted to be butchered. I pray every day and at every opportunity that this terrible and unhappy war would cease, but as it seems in vain. We here in spite of all reports cannot have an idea of the misery which now ex-



ists in Europe. Neither have I ever received any word from you, if you have ever written, and I am very much worried that nothing will happen to you. I cannot escape a shudder when I ponder over the situation, and yet it seems that fate wills it so. I cannot understand that the stupid French cannot see that they are in vain sacrificing their sons to salvage damned England's chestnuts from the fire. And that our country too should offer herself for cursed gold to furnish tools of murder to blow hundreds of thousands of human lives out of existence. We protest, telegraph, argue, and do all we can, but all our efforts seem to have no effect upon the Administration in Washington. And an end not yet in sight. Our can never repay for the curse of his deeds, for it seems as if he has sold his soul and body to the devil and his ally England, and it looks as tho he were lending every effort to throw our country into this war. But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the blood-bath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe. This monster of a president seems not to notice the bloody handwriting on the wall, but it will be that much more red when the hour comes, and he shall persist to throw this

country into the mouth of inhumanity and war. I hope it will not come that far and that the good own common sense of the American people will not leave them at this hour. Dear brother, write to me how everything looks and how you are, for I would be glad to hear from you. I have raised your allowance to Mk 100 per month to the conclusion of war, and I hope that it will get to you promptly. I feel very sorry for your wife and your small children as well as Kaspar and children and for Father, in fact all concerned and hope that this butchery will soon come to an end. The whole world admires the Emperor, for he is perhaps the greatest man that ever lived, the ablest soldier, diplomat and ruler, and I hope he will succeed to lift the world back upon its axle. If he can't do it, nobody else can.

And now, dear Brother, remain true to your flag and your fatherland, do not lose courage and God will never leave you. I will do everything in my power to help at home and otherwise.

**GOD WILL NOT DESERT THE GERMANS**

Pray for me so I may remain well and be able to help you, and I am willing to sacrifice everything to contribute my mite in this dreariest time and hour in order to alleviate the misery of the unfortunate and suffering. And now, my dear Brother, I shall have to close for this time. It is

already past 11 o'clock and I have several letters to write yet. I have sent my family to the beach a week ago because my two youngest boys had the whooping cough and nothing would help, and hence the Doctor advised change of climate. We are only about 118 miles from the coast and I can get there every Sunday by fast train. The trip takes 5 hours, but I can spend the day with them.

With hearty greetings to you and your comrades, and hoping to hear from you soon, I remain as ever

Your loving brother.

P. S. Your wife sent me a soldier's photo of you, which I heartily enjoy."

On July 14, 1916, defendant, Joseph Woerndle, wrote a letter to Mr. H. W. Boehm, as follows:

"July 14.

Mr. H. W. Boehme,  
Kurfuerstendamn, 100,  
Berlin-Halusee,  
Germany.

My dear Mr. Boehme:

I have received two of your letters and I have answered both of them previously, but it seems that neither of my letters came into your hands, however, both of my previous letters did not touch upon your business affairs very much, as I

had no chance to get up a complete report which I now submit. I have had a talk with the Ladd & Tilton Bank in reference to your note and have found that no part of the principal of \$500 has been paid off, although the interest have always been promptly made. I have also called at the office of the Northwest Importing Company and have had a talk with Mr. Bult several times. The Northwest Importing Company is still in existence but like a great many other concerns has just about kept (about) above water, without counting, however, running expenses as far as the salary of Mr. Bult concerns. Mr. Bult was very nice in showing me over the whole premises and the books. From said books, I find that on the first day of January, 1915, the business was charged with the following:

## Assets:

|                           |                |
|---------------------------|----------------|
| Ladd & Tilton Bank.....   | \$500.00       |
| Printing Bill .....       | 35.00          |
| Portland Brewery .....    | 25.00          |
| McCondrey Bros. Teas..... | 36.40          |
| Livery .....              | 56.00          |
| Fletcher, Teas .....      | 10.00          |
| Casswell, oils .....      | 55.00          |
| Burnett, Cash .....       | 40.00          |
| Paste Co. ....            | 20.00          |
| Total.....                | <hr/> \$777.40 |

The outstanding credits amounted to \$700.00, plus fixtures and some stock. Against this is also charged your note of \$735.00 and owing Mr. Bult for salary balances \$125.

On January 1, 1916, the debits show:

|                             |          |
|-----------------------------|----------|
| Ladd & Tilton Bank .....    | \$500.00 |
| Neisson Company, oils ..... | 199.10   |
| Printing .....              | 10.00    |
| Portland Brewery .....      | 25.00    |
| McCondrey Company .....     | 90.00    |
| Livery .....                | 67.00    |
| Casswell .....              | 55.00    |

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Total.....\$824.10

Plus note H. W. Boehme, \$735, account Bult, back salary balances \$180.00. Outstanding credits credited against this, \$739.00.

On the 14th day of July, the date of this writing, I find the following charges:

|                             |          |
|-----------------------------|----------|
| Ladd & Tilton Bank.....     | \$500.00 |
| Niesson & Co. ....          | 199.10   |
| Portland Brewery .....      | 25.00    |
| George Harvey, Loan Broker, |          |
| 3% P. M. ....               | 100.00   |

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Total.....\$824.10

The outstanding accounts amount to \$807.00.



Besides this is your note of \$735.00 and accumulated salary balances of Bult in the sum of \$330.00.

The net profits for 1916 are as follows:

|                |          |
|----------------|----------|
| January .....  | \$ 96.25 |
| February ..... | 55.19    |
| March .....    | 91.16    |
| April .....    | 109.00   |
| May .....      | 96.25    |
| June .....     | 61.85    |

The above, however, are not embracing Mr. Bult's salary; hence every month except April shows a loss. Mr. Bult now pays all cash and owed nothing for coffee. The rent has been reduced to \$30.00. This gives you a clear idea as to the conduct of the business. There has been paid in by Alma Raleigh, the sum of \$60.00, which is held subject to your orders and here on deposit. Incidentally I may say I have received in your first letter a check of \$10.00, attorneys fees. This is the sum I have heretofore acknowledged, but perhaps you have not received my letter.

In reference to your lots I would say that the bank still holds title to the same as to the equity on the acreage in Lents. I have taken up the matter with Mr. Bult, but as he was not in a position to get me the deed, I have withheld the same and now still withhold the contract. I am afraid,

however, that since no payments have been made on the contract, same has ceased to exist as an asset. I am of the belief, however, that one can get title again by paying up back installments. Your other goods I am having in my safe-keeping as before. So much for the business end of this communication.

Your last letter I have received from Salt Lake City, was written on an Underwood Typewriter. Strange isn't it. I have too, sometimes wondered at the report that you was within the boundaries of our state, but I am inclined to believe that you would have called, had you been here. But never mind, when this horrible butchery in Europe is over, you may be able to tell me all about it. Just yesterday we received the news that the German submarine "Deutschland" has arrived in New York. You can imagine the joy among the "hyphenated", although the news from the front are somewhat discouraging of late. However, I hope with the prayers of the millions within the confines of this beautiful country, the victory will go where it belongs and the poker chip stake of the proud Albien will twindle down, with the aces of the deck all in Wilhelm's hands. Even the most faint-hearted have a ray of hope, with the first days of the far and long heralded offensive of the allies simmering down in significance no

matter what friend or foe may think of German militarism and the Kaiser's "Me and Gott." No human being has ever guided the destinies of that country, like Wilhelm. It is a struggle long and hard but with the faith, confidence, loyalty and endurance, the outcome of the struggle is not in doubt. We are here doing our best. We are filing scores of protests against the unneutral (seemingly at least) acts of our Government, and in a small degree, I support they have had a bearing upon the relations had in the past with the country across the water, second dearly loved by us all. However, we have not achieved that which from a Christian humanitarian and civilized standpoint, we considered expedient and proper. We have been compelled to see German dollars, intrusted to our banking institutions, swell the war loans granted by J. P. Morgan and his crows, unable to help ourselves or to stop the banks from so doing, and the present predicament shows us how important it is for the German speaking people of this country and their descendants to rally to the banner of true Americanism, i. e., to guard our interests, first, last and always as American citizens only and not to foster English enterprises and bolster up their half bankrupt country. I am somewhat sorry to notice that the allies have again gained an inroad into the German lines of de-

fense, but hope that these gains are only temporary and that they will exhaust themselves before they will reach their goal. I would be pleased to receive from you news as to conditions existing at present in the dear old Fatherland.

Do you in your travels ever get near Rosenheim, Bavaria? My folks live at Bernau am Chimsee. They would be glad, I am sure, if you could say 'Hello' for me. If there is anything I can do for you in any shape, let me know. Often wished I could go home and do my share, to help carry the burden, but I presume I can be of greater use right where I am.

Hoping to hear from you soon and submitting my kind wishes, I am, believe me, as ever,

Sincerely your Friend.

W/B"

On September 15, 1917, defendant Joseph Woerndle, wrote a letter in German to his father, as follows:

"September 15, 1917.

Mr. Kaspar Wörndl,

Bernau a/Chimsee, Oberbayern, Bayern.

My dear Father:

At last I have succeeded to discover an address to have a few lines reach you. I have not heard from you for over one year and the uncertainty regarding yourselves drives me nearly crazy. The

enclosed letter was the last one I wrote, but like another one written prior came back to me. We are already since last March, tho indirectly, in this butchery, and no end is in sight yet. I hoped in vain that the peace proposal of the Holy Father would bring the long sough peace, and yet the whole human race prays for an end to this butchery. How long it will last yet only God knows. About the terrible suffering at home and otherwards in Europe we have probably no idea, but what may come here only providence holds in hands. A week before the outbreak of the war I have sent you thru the Transatlantic Trust Co. in New York \$250.00 or about Mk 1200, but do not know to this day if you have received it. I paid for telegraphic remittance, but no return report ever came. How are you and are my brothers yet alive? The thought about them and their children and wives nearly takes my senses. How is your health? I hope and pray to God every day that he may spare you for us. If this unfortunate war is once over and I have the means, I hope to come out to you for a visit. Who and how many of my old comrades and acquaintances have already fallen? Are there yet any people left? Write to me, dear Father, and address the outer envelope either to "German Aid Society, Stockholm, Sweden" or to "American Red Cross, Stock-



holm, Sweden." The inner envelope which contains my letter must have my address on the outside.

Otherwise I am getting along fairly well. Business is on the dogs entirely and how everything will end I have no idea. If you write to me, dear Father, do not forget to paste an international postage stamp on the envelope addressed to me. And, dear Father, write without delay. Hoping that this letter will find you all alive and well, and with kind regards to you all, I am

Ever your grateful son."

Some time after January 3, 1916, and prior to July 14, 1916, defendant, Joseph Woerndle, received the following letter :

"Lille, France, Jan. 3. 16.

My dear Woerndle,

I wonder, if you ever have received any of the letters, I have written to you from various places. I have my doubts about it, as our dear friends, the English, particularly late, rifle even the neutral mail bags rather thoroughly. I have an opportunity of sending these lines through by a private party to the dear old U. S. and hope, that they will get safely into your hands. No message from you ever reached me and I believe, anything you may have written, rests safely at the bottom of the ocean.

Is the Northwest Importing Co. still in existence? When I left the Co. owed Ladd & Tilton \$400.00, for which this bank was holding, as security, my deed to 4 lots in Portland; according to the agreement the loan should have been paid back long before this—I wonder, if this has been done? The deed should have been returned to you by Bult. If it has not been turned over to you, will you be kind enough, to take the matter up with Bult. The N. W. Imp. Co. further owes me personally \$735.00, for which amount a note should be in your hands. This note I had, at my departure from Portland, given to friend Klein of the Hofbrau as a security for a certain loan. The latter has been paid back by me about a year ago and my cancelled check to Klein is in my possession. Klein was requested, to turn the note over to you. The N. W. Imp. Co. should have begun long ago, to pay at least \$25.00 per month on this note. Will you look after that too? So much for the business——

As to me personally I got through so far with a whole skin, and am feeling splendid. I am captain, detailed to the General Staff and “Ritter des eisernen Krauzes.” My wife and children are very well, the little fellows speak German fluently, and Madam is still overwhelmed by the

greatness, the enormous strength, the silent unconquerable power of Germany. As to the end of the war, nobody can predict, when it will be; as to the outcome, there is no doubt; We HAVE WON! Our armies are standing, an unbreakable wall of iron, in the enemies' countries, we have everything we need, now or in the future, Serbia is completely eliminated, so will Montenegro be, the Allies at Gallipoli are no longer to be reckoned with, Albania will be taken, the English and French will be thrown out of Saloniki, and even if we should return every foot of conquered territory in the East and West (remember: we are not carrying on a war of conquest but a defensive war, into which we have been forced!) our victory will be great and far reaching, for the ring of our enemies has been broken forever, we are standing hand in hand with our friends and the road to the Persian Gulf is open, a fact, which will be of the greatest consequences! The German total losses are smaller than the French losses alone, or our wounded 92% return to the front. In the battle of the Champagne the French lost 250000 men, the English (at Loos 60000 and we—between 35 and 40000 men!

The English—and they know it themselves!—are in the position of a business man, who has ventured the bulk of his fortune in a great enterprise,

which turns out to be a losing proposition, and who is now compelled, to throw the remainder of his fortune into the gap, in the vain and hopeless attempt, to turn the tide in his favour. It is too late! they are beaten, but, of course, they cannot admit it as long as there is still a hope of getting some new fool to get the chestnuts out of the fire, and—the English always have been willing to fight to the last Frenchman!

It is really almost pathetic, to see, to what means they have to resort, to keep up appearances for at least some time to come; no means are too low, no lies too brazen! Since the Belgian and other atrocities do not work any more, I should not be surprised, if they would try, to tell the American people, that Germany will, after this war is over, tackle the U. S. Anything, to poison the mind of the Americans! We know, of course, that the big papers, owned or in the pay of the English, do not represent the actual sentiment of the people, who would be immensely pleased, if an American citizen would be placed on each English ship, to save the English navy from our submarines. One could be surprised, why certain people have not hit upon the idea of placing, board and room free, some American citizens in each trench of the Allies and telling us, "Don't you dare, to shoot this

way, here are Americans"! Just imagine, in what fix this would put us Huns and Barbarians! Why, in the name of all common sense anyway, do we object to being blessed with Kossaks, Senegalniggers and colored Englishmen's civilization!

Well, duty calls! Sincerest regards to all, who remember me.

Faithfully yours,  
H. W. B.

Berlin-Halenses

Kurfuerstendamm 100.3

That all of the letters heretofore quoted and being in pages 5-24 of this Statement of Evidence, the same beginning with the letter on page 5 hereof, dated May 31st, 1915, written to one Hoerner, and ending with the letter on page 24 hereof signed H. W. B., were admitted subject to the objection of the defendant that the same were incompetent, irrelevant and immaterial and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in violation of the 4th and 5th Amendments to the Constitution of the United States.

The defendant Woerndle on the witness stand in his own behalf testified that when he discussed the passport matter with Boehm in 1914, Boehm said he wanted to go to Germany, but could not because he could not get a passport not being an American citizen,



and that Woerndle offered Boehm, Woerndle's passport and other papers for identification.

Woerndle further testified that he was a child of poor parents—his mother died when he was a mere infant and he never knew her; his father remained unmarried for thirteen years and took care of the children and the family was very much attached to each other and when the defendant wanted to go to college, the brothers agreed to stay at home and bear the cost of his education. In that way defendant was given much that the others did not have and one member of the family would do for the other anything that they could learn or find out they wanted. There was some concern about the defendant's health and he learned of the healthy climate in America and the opportunities for people who were willing to work and at the age of sixteen years, defendant decided to come to the United States. In order to get away and avoid military duty he applied for and was given a certificate renouncing German citizenship and releasing him from liability for military service; that said certificate deprived him of any vestige of German citizenship. Defendant had not performed any military service and had had only such training as was given in college. Defendant was always opposed to violence, war and butchery of any kind; never approved of the military system and that was one of the reasons why he wanted

to get away from Germany while he was young enough to get away.

He landed at Castle Garden on July 30, 1897, and after being in the United States a little more than a year, declared his intention to become a citizen at Chehalis, Washington. He was first employed working on a section or construction gang building a railroad in the western part of the State of Oregon; wages \$1.25 a day; afterwards worked in logging camps, saw mills and any work that was offered. He was married April 5, 1905, to an American girl named Cecelia Sherlock; there are three boys, age 16, 12 and 10, all born in the United States; neither the wife, nor any of the children speak, read or write German.

Since coming to the United States, the defendant has contributed financial assistance to his father and brothers, making monthly remittances, and later as his earning capacity increased, he was his father's whole support. At the outbreak of the European war in 1914, defendant was living in Portland, practicing law, and acting as legal representative of the Austrian Consul at San Francisco. Since the discontinuance of the Austrian Consulate, defendant has been and still is attorney for the Czecho Slovakian, Serbian Poland and Serbian Governments.

Referring to the Boehm passport, Woerndle testified that after receiving letters from home and realizing the hardships and the terrible situation out there,

he sort of made up his mind that he would go back and see what he could do for them; that it drove the defendant nearly crazy to think that his old father in his advanced age of life had to endure those hardships and defendant was willing to go to any limit almost to go to work and help him. Defendant could not go on account of his own family here, but when defendant got acquainted with Hans Boehm, Boehm offered that he would be glad to return; Boehm was a reservist and had received a call to go anyhow and said that anything he (Boehm) could do over there, he would gladly do, to which Woerndle said: "Well, since I can't go, I will let you have my passport," with the understanding that if Boehm failed to get through he was to return the passport again.

Woerndle testified he did not hear from Boehm from October, 1914, until he received the letter dated January 3, 1916; that in October, 1914, there was no thought of the United States being at war and that defendant did not consider the consequences of the passport incident in connection with the United States; that he did not think about it and had only in mind to give what aid he could to the place of his birth and to bring it to his father.

Defendant testified that he had formed the habit of keeping a diary for years in which he had a daily expense account and wrote down occurrences and his feelings and thoughts. Also that sometime in Decem-

ber, 1918, the Government made a raid on the defendant's home and office and took everything in the form of literature, letters, books, etc., in all a small truck load of stuff, including his own personal correspondence and diaries, including the particular letters heretofore set forth in this Statement of Evidence.

After October, 1914, and until the entrance of the United States into the war, defendant continued to correspond with his people in Germany, writing sometimes twice a week and four or five times a month, trying to reach them continually. Defendant's youngest brother, who had five children, was then serving in the army, drafted during the early stages of the war. Defendant's older brother, who had seven children, was at home with his family, employed by the German postal department. There was no one at home to take care of defendant's father and mother and farm and do the work except defendant's sister-in-law, father and stepmother. Defendant's parents were in want all the time. Defendant received letters from his father during the first stages of the war imploring him not to forsake them in their misery.

Defendant wrote many letters to his relatives, which were not delivered; some were typewritten; some were written in longhand. His family wrote the defendant that any ordinary letter deploring the war, was hardly ever delivered; they would not get any and that was the reason defendant resorted to almost any means to get

word to his father and sister-in-law. He could not write to his brother because he was in the army. After defendant had written four or five letters and none of them reached their destination and letters containing financial aid in the form of paper money, would not be delivered, defendant hit upon the idea that the only way to do was just to go to work and show sympathy for the other side "and a lot of these compliments, for instance to Kaiser Wilhelm, were merely to expedite the thing and get the letters through the German censor, because there were few letters—they wrote me—there were very few delivered."

Defendant loved Bavaria but has no sympathy particularly for Kaiser Wilhelm; that the Bavarians, after they were annexed from Austria to Germany were always more or less bitter against the Hohenzollerns. "Anyhow there never was any sympathy of any great extent, I am sure of that, because even during the Franco-Prussian War it was folk talk that they did not have any particular sympathy for that house because they were happier with the Austrian house than they ever were with the Hohenzollerns."

That the various derogatory remarks in the letters referring to the United States were not his sentiments, but that he used these expressions to get the letters passed the German censors. That he used the same method in the letter to one E. Hoerner, because Hoerner did his banking business out in Germany and dur-



ing the war managed thru him to get remittances to his father and to other people related to him; that therefore it was almost as imperative for him to reach Hoerner as it was to reach his own folks, because he had to depend entirely upon him to make these remittances to his father.

Defendant testified that after the United States entered the war he did everything he knew how to be helpful or useful to the United States. "In my capacity as attorney for the Austrian Government people would come to me and whenever anything didn't look right, I made my reports to the District Attorney's office and did everything that was humanly possible. After we went into the war, I never even tried to get a letter across to my father or sent him a 5 cent piece for support, much as it broke my heart." That he made a report to then United States Attorney Reames about a Hungarian named Gorman who offered his services to Woerndle to do anything that might be needed in behalf of Austria Hungary in connection with the war. The records of the United States Attorney's office show that Woerndle wrote a letter to Mr. Reames about this incident. That he made various reports and among them he plainly recollected making three reports, and that in another case he reported a certain man named Gorman, who came to his office and after inquiring if the defendant represented Austria, said:

"Well, I am here to be at your service, whatever you need for, anything at all you want to have I will do—if there is anything to be done in connection with this war, I will do it." The defendant testified that when this occurred he told Gorman first of all he ought to be ashamed to talk that way and secondly that we were at war, he was a citizen, and if he were not, he would not soil his hands with anything of this kind, and that after the man had given the defendant his address he at once reported the whole affair to the United States Attorney who in turn referred the case to the military department.

Defendant testified that he bought Liberty bonds during the war with all the means he had and trust funds, and that he had certain trust funds to invest in any way he saw fit and that he invested these in Liberty bonds and that in several cases of estates (naming the estates) he petitioned the court to be allowed to invest their funds in Liberty bonds; that he never refused to contribute to the Red Cross, Y. M. C. A. or other war activities, and always made liberal donations and gave whatever he could afford to give; that he notified the alien property custodian of all property he had belonging to aliens, including that of Boehm; and that as a result of his report on Boehm's property, an operative of the United States Intelligence Bureau of the Department of Justice called upon him and he turned over to the operative all Boehm's

effects, including sealed envelopes addressed to Boehm's father, deeds, will, correspondence and other property; that this property was all offered by the defendant to them six months prior to the raid upon him and that he was told to "Keep them, that is all right." That a good part of his time was taken up with questionnaire work of Austrian people, for which he made no charge, and advised aliens not to claim exemption, and told them as long as they were making a living they ought to stand by the country that gave them shelter; and that as a result of his efforts in advising these aliens not to claim exemption from war service he remembered only two cases in which they refused to waive their exemption; that he was never arrested during his residence in the United States, that he is a tax payer; and all that he has is in this country; that he had no thought of disloyalty to the United States, that he never did anything that conflicted with the interests of the United States. In reference to the Boehme passport application, he testified: "I didn't look upon this passport question in the first instance that way; in fact, never gave it any thought until the thing was all over and too late; but as far as my life here is concerned, I can refer to every community I ever lived in, I have done the best I could for the uplift of everything. And if I hadn't been above the age limit to call to service, I know that I would not have evaded the law. I have always done what I thought I

was expected to do, and then some", and if necessary or if the country needed it, he would "go the limit, life and property—anything" in making personal sacrifices for it.

Defendant was admitted to the bar in 1909, and in 1914 was the sole representative of Portland of the Austrian Consul who was located at San Francisco; in 1914 Nationals of Austria went to him for information and advice; he published at Portland a German newspaper for which he wrote editorials; he was aware of the issuance by the President of proclamations of neutrality.

Defendant said he realized he was doing a wrong thing against the United States when he aided Boehm with his passport, and as a lawyer knew in 1914 he was committing a felony; and in this respect further testified, "I didn't give that any thought; it didn't look to me, to allow him to travel on that passport, it never even occurred to me, I never figured the consequences." That his heart was with the place where his cradle stood and with his folks and that he felt grievously sorry and that was the main reason, not to help Boehm. His belief that expressions of hostility to the United States would aid in getting his letters passed by the German censor was from his own deductions, defendant testifying he just reasoned this out from powers of deduction, that if the same thing were true here and we would feel perhaps the writer was sympathetic, we

would give it greater consideration than we would a letter that came from a hostile hand, and he never intended an unkind remark against the United States.

Otto Berg, manager of the insurance department of Hartman & Thompson, testified he had seen Woerndle fill out many questionnaires and knew that Woerndle had advised two or three aliens or alien enemies to go to war since the United States got in.

Approved Sept. 23, 1922.

R. S. BEAN,

Judge.

CERTIFICATE OF CLERK OF U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD

United States of America,  
District of Oregon, ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify, that the foregoing pages numbered from 1 to . . . inclusive, constitute the transcript of record upon appeal from the decree of the District Court of the United States for the District of Oregon, in a cause in that court in which the United States of America is plaintiff and appellant and Joseph Woerndle is defendant and respondent; that ~~I have compared~~ the *Grhm* foregoing transcript with the original record thereof and that the same is a true and complete transcript



of the record of proceedings had in said court in said cause as the same appear of record and on file in my office and in my custody. *But in accordance with stipulation filed I have not compared this transcript with the original thereof*

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said court at Portland, in said district, this .....<sup>7<sup>th</sup></sup>..... day of October, 1922.

G. H. MARSH,

Clerk, United States District Court  
for the District of Oregon.

No. 3932

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IN THE

United States Circuit Court  
of Appeals

For the Ninth Circuit

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UNITED STATES OF AMERICA,  
Plaintiff, Appellant,

vs.

JOSEPH WOERNDLE,  
Defendant, Respondent.

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Brief of Appellant

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Upon Appeal from the United States District Court  
for the District of Oregon.

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LESTER W. HUMPHREYS,  
United States Attorney for Oregon,  
For Appellant.

FILED

JAN 2 - 1923

F. D. MONCKTON,  
CLERK.



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United States Attorney for Oregon,

For Appellant.

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## STATEMENT.

This is a suit to cancel the citizenship of Joseph Woerndle, a naturalized German. After hearing the evidence, the trial court dismissed the bill. The Government appeals.

The facts were not disputed. Indeed they were, for the greater part, stipulated.

Woerndle was born in Germany. He came to the United States in 1897, and was naturalized in the Superior Court of the State of Washington at South Bend, August 23, 1904. Afterward he removed to Portland, where he studied law, was admitted to the bar, became the legal representative at Portland of the Austrian Consul, edited a German newspaper, and prospered.

The suit is based on fraud. The fraud charged is that Woerndle's oath renouncing allegiance to Germany and declaring allegiance to the United States was false, in that he secretly reserved and kept allegiance to Germany.

The Government's theory is that the sincerity of an oath of allegiance must be tested by those acts and words which are inspired by the first opportunity after naturalization to act or speak concerning America and the mother country; that the criterion of original fraud must be the later conduct, which

in its relation to the earlier attitude, will furnish safe ground for judgment.

The evidence showed that in October, 1914, after the European War began, and America had officially proclaimed its neutrality, Woerndle corruptly abused his American citizenship by lending it as a cloak to one Boehm, a German Reserve Officer, to the end that Boehm should and did travel from the United States, through belligerent zones to Germany, in the name and guise of Joseph Woerndle, American citizen. The detail of this incident is described by Woerndle himself in a dairy written by him under date October 2 and 3, 1914, in these words:

"2. Had a grand dinner with Paul Wesinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty and make will.

"3. Boehm gave me power of atty. and drew will. I will furnish him with pass— & U. S. citizen papers so he can travel in my name. Also gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my addres c/o Waldorf-Astoria, New York, where Boehm will call for it."

It was shown further that Woerndle wrote letters, when he believed the United States was on the point of entering the war in 1915 and 1916, which make a clear choice between the United States and Germany. In these letters he said, among other things:

“Judging from present conditions this country, too, will be involved in a war with Germany, loved, poor, unfortunate Germany. If I were out there today as three years ago, I would without hesitation sacrifice my all for loved old fatherland. Were it not for my family here I would have long ago returned to my old home to aid it in this time of greatest need. The American, moblike, would be glad, if it could get one over on Germany, but the German Michael will not have to be afraid very much. The United States are noisy, but when it comes to do something they are slow. This nation could not force ragged Mexico to salute the American flag. Few Germans will shoulder arms, and of the others not many will put their head in front of a Howitzer, and hence perhaps not everything will be lost at once . . . but I may say to you, persevere to the last man, for as I hope victory will yet go to the Germans.”

“As it now seems, only God Almighty can

save us from war with my own Fatherland . . . The good beautiful land where my cradle stood, poor, poor Germany. Sad enough that our government supplies the English rag pack and others with shiploads of ammunition, but wants now also to declare war on Germany.

"And it now seems as if this country too wants to declare war on Germany. Kaspar, I do not know if after the war is over I will not return to the land of my cradle . . . I have three boys and these would perhaps be needed by my dear old Fatherland after the war.

"I am ashamed of the action of the American nation regarding Germany. But that America will be penalized for its double standard I have no doubt. If I were out there I would also be found in the trenches or on the battlefield—dead. We hope and pray that the Germans will win out in the end, but human strength only does not seem to make it possible.

"I am ashamed of the action of the American nation for they can never make reparation for it. I wish I had the means, I would be glad to give all to beautiful old Fatherland to aid it in this hour of need. If I were in Germany as three years ago, I would gladly allow myself to be put in uniform or otherwise be of benefit to the

Fatherland. Do you think the Germans will be victorious? God grant it. This is perhaps the last letter that I can send direct to you, for if I am not deceived, this Country too tries to break with all force the peaceable relations with Germany, and if once diplomatic intercourse is suspended, a declaration of war will not be far off.

“There is no more neutrality or impartiality for the second American note to the German government shows without doubt that the American government wishes to paralyze the submarine warfare so as to play in this way into the hands of Germany’s enemies.

“But only in case of my death I want you to inherit this land. As long as I live myself I may need it perhaps to build a house on it and to live in it if the Germans once should be chased out of here. Would not be regretted much for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left.

“ . . . and it looks as though he were lending every effort to throw our country into this war. But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the blood bath which he here prepares will



outtop in blackness any shadow which the angel of death has ever thrown on Europe. This monster of a president seems not to notice the bloody handwriting on the wall, but it will be that much more red when the hour comes, and he shall persist to throw this country into the mouth of inhumanity and war."

Meanwhile Boehm had gone to join the German forces, secure in the protection of Woerndle's passport. Then came February, 1917. On the 1st of February, 1917, Woerndle was startled by these headlines in the Portland "Oregonian."

"PASSPORT CASE PROBED  
EXTRADITION OF CAPT. BOEHM  
IS CONSIDERED.

"All persons connected with issuance of papers to German to be called to Account by Washington."

The newspaper related that Boehm had been arrested by the British at Falmouth, England, enroute from Spain to Holland traveling with a fraudulent American passport, as Jelks Leroy Thrasher.

The next day, February 2, 1917, the "Oregonian" again had news of Boehm, under this heading and opening paragraph:

**"BOEHM KNOWN HERE  
MAN HELD AS GERMAN SPY IS FORMER  
PORTLAND MAN**

"Capt. Hans Boehm, who is accused of traveling as an agent of the German government with an American passport bearing the name of Jelks Leroy Thrasher, and whose case is undergoing a rigid examination by the State Department at Washington, is well known in Portland."

Woerndle saw these articles, and realized the enormity of his offense in connection with the passport of October, 1914. He turned back the pages of his diary and cut out the entries of October 2 and 3, 1914, heretofore quoted. He rewrote the events of those days on another page, and pasted the rewritten page on the stub of the page he cut out. The original and substituted entries are as follows:

**Original Entries.**

"2. Had a grand dinner with Paul Wessinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty and make will.

"3. Boehm gave me power

**As Rewritten.**

"Had a grand dinner with Paul Wessinger . . . and H. W. Boehm. Maybe I can't go with Boehm after all, but he says he will go in spite of hell. I only pity my poor father but then my own family and children. Cecelia does not want me to

of atty and drew will. I will furnish him with pass— & U. S. citizen papers so he can travel in my name. Also gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my address c/o Waldorf Astoria, New York, where Boehm will call for it.”

go and maybe I wont, but I can't just stay. At any rate I will get my passport in shape so as to have that part ready if I should decide to go. Wrote to Sec. of State to forward my pass to Waldorf Astoria Hotel where I will call for it. Boehm urges all he can for me to go with him. Maybe I will but there will be a surprise when I am gone.”

In December, 1918, information of Woerndle's aid to Boehm reached the United States Attorney at Portland. Affidavits for search warrants were made and warrants issued upon which the Marshal searched Woerndle's office and home, and found Woerndle's diary, copies of his letters and other papers. After this suit was begun, Woerndle petitioned the Court in November, 1921, for the return of these documents, alleging that the search was illegal.

It was apparent that the affidavits for search warrants did not meet the requirements of the statute, and no objection was made by the United States Attorney to the return of the papers. The Court ordered them returned, but refused to order that copies of them be surrendered by the United

States Attorney. The originals were delivered to Woerndle. Afterward, in February, 1922, the government applied to the Court for an order to require Woerndle to produce these originals at the trial. The order was made, but neither the documents nor copies were offered in evidence. Their contents had been covered by a stipulation of facts.

As to the facts thus agreed upon, the stipulation waived "any and all objections of every kind as to the manner of proof and as to the sufficiency of proof" but reserved "all other objections as to the competency, relevancy and materiality of these facts." As to the letters the stipulation reserved additional objections as follows: "Constitutional and statutory rights and objections of defendant in reference to the following letters are reserved."

Defendant was a witness in his own behalf.

The Court made no findings, but filed a memorandum opinion, holding the evidence insufficient, and dismissed the bill.

## SPECIFICATION OF ERROR.

### I.

The Court erred in holding that a passport fraud, deliberately perpetrated upon the United States by the naturalized German, Woerndle, then in the employ of the Austrian Consular Service, in October, 1914, by which he aided a German Reserve Officer,

then in the United States, to assume the identity and citizenship of Woerndle, and return through belligerent territory under fraudulent protection of American citizenship to enter the German military service; together with letters written by Woerndle when it appeared to him that the United States was about to enter the war, saying he was ashamed of the action of the American nation, that if he were in Germany he would gladly allow himself to be put in uniform and would be found in the trenches or on the battlefield, dead, with other similar expressions and with the other evidence in the case, did not show that Woerndle had not honestly renounced allegiance to Germany; this having been his first opportunity after his naturalization to exhibit by word or act, his true allegiance.

## II.

The Court erred in holding that Woerndle had been loyal to the United States after February, 1917; the undisputed evidence showing that Boehm's passport fraud was discovered then, but Woerndle's part in it still unknown; that the government then began an investigation, and that Woerndle, on learning of the investigation, became fearful and concealed evidence of his part in it, by cutting an incriminating page out of his diary, and pasting a rewritten expurgated page in its place.

The Court erred in failing to hold that when



Woerndle, a lawyer admitted to the bar in 1909, the sole representative at Portland of the Austrian Consulate, the editor of a newspaper published in German at Portland, did the things set out in specifications I. and II. his acts were inspired by an allegiance to Germany superior to his allegiance to the United States.

#### IV.

The Court erred in holding that the evidence was insufficient to support plaintiff's bill of complaint.

#### V.

The Court erred in dismissing plaintiff's bill of complaint.

#### VI.

The Court erred in failing to decree the cancellation of Woerndle's citizenship.

### POINTS AND AUTHORITIES.

#### I.

(a) In a suit to cancel a certificate of citizenship, the criterion of original fraud must be the later conduct, and the fidelity of an alien at the time of his naturalization must be determined by trying out his attitude of mind and heart in later years when there first arises an occasion for him to exhibit by act or speech his real sentiments as between his native country and America.

Schurman vs. United States, 264 Fed. 917

(9CCA) 18 ALR 1182-1185.

United States vs. Kramer, 262 Fed. 395  
(5 CCA).

United States vs. Herberger, 272 Fed. 278.

United States vs. Darmer, 249 Fed. 989.

United States vs. Wursterbarth, 249 Fed. 908.

(b) Disloyalty of a naturalized citizen, *prima facie* establishes fraud in his naturalization. It requires explanation to overcome it, and the burden of explaining is on the defendant. *Id.*

## II.

Allegiance to America is not a thing of war time only; it is equally a condition of peace.

## III.

From August 4, 1914, the neutrality of the United States was officially proclaimed by the president; and citizens were enjoined to observe the laws of the United States, and were warned that any misconduct was at their peril.

38 Stat. Large, Part 2, pp. 2001-2024.

## IV.

In October, 1914, there was a conflict between the interests of the United States and of Germany. Woerndle's duty to the United States required him to leave its neutrality free from embarrassment. Germany's interest required that its military agent, Boehm, return safely from America to Germany.

Woerndle thereupon used his American citizenship in aid of Germany, placing his devotion to Germany above his duty as a citizen.

## V.

In writing letters, Woerndle had in contemplation war between the United States and Germany. His condition of mind was the same as if war had actually been declared.

## VI.

When Woerndle, having in mind war between the United States and Germany, wrote that he would without hesitation sacrifice all for loved old fatherland, that his three boys would perhaps be needed after the war by his dear old fatherland, that he was ashamed of the action of the American nation, that he would not much regret being chased out of the United States as a German, that if he were in Germany he would be found in the trenches or on the battlefield, dead, and similar expressions, he was inspired by such an adherence to Germany and hostility to the United States that his oath of allegiance could not have been sincere and honest.

## VII.

After Boehm's arrest early in 1917, and the government's investigation was announced, Woerndle was so fearful of the consequences to him that he

concealed evidence of his fraudulent and unlawful conduct. His conduct thereafter was inspired by fear of prosecution, and for that reason it has no probative value favorable to him.

### VIII.

The trial court made no findings of fact. The facts were not disputed. The passport fraud and the letters were stipulated. The Court is not asked here to review a finding made on conflicting testimony where the trial judge was aided by personal observation of the witnesses. The presumptions arising in favor of such findings do not attend this case. The question here is whether the Court erred as to the effect of uncontroverted facts; and in that view the case is here *de novo*.

U. S. vs. Booth Kelly Lumber Co., (9 CCA)  
203 Fed. 423-429.

Booth Kelly Lumber Co. vs. U. S., 237 U. S.  
481-484-486.

Waterloo Min. Co. vs. Doe, (9 CCA) 82 Fed.  
45-51.

The Santa Rita, (9 CCA) 176 Fed. 890-893.

### IX.

An opinion of a trial judge in an equity case is not "a finding and statement of facts."

Hendryx vs. Perkins, (1 CCA) 123 Fed.  
268-270.

## X.

Facts obtained by an invalid search do not thereby become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others.

Silverthorne Lumber Co. vs. U. S., 251 U. S.,  
385-392.

## XI.

A suit to cancel a certificate of citizenship for fraud is not a criminal proceeding nor a suit for a penalty or forfeiture.

Johanessen vs. U. S., 225 U. S. 227-242.

Luria vs. U. S., 231 U. S. 9-24.

U. S. vs. Ellis, 185 Fed. 546-549.

**ARGUMENT.**

This case can be stated in a single question: was Woerndle's oath of allegiance sincere and honest? For if not, it was a fraud upon the Court that admitted him.

We measure the sincerity of a man by his acts and words. We must know also what manner of man he is, his education, position, and daily occupation. By these we estimate his capacity to realize the consequences of his acts and words.

Let us see then who Joseph Woerndle was. He was born in Germany of poor parents. His father



and brothers made sacrifices to the end that he might go to college in Germany. He came to the United States and began as a laborer. He studied law, and in 1909 was admitted to the bar of Oregon. In 1914 he had been practicing law for five years in the City of Portland. He was the sole representative at Portland of the Austrian Consul, who was located at San Francisco. Austrians went to him for information and advice when the war began. (Trans. p. 180.) He was the editor of a newspaper published in German, for which he wrote editorials. From the beginning of the war, he was active in raising money for the German Red Cross and other like enterprises.

German collegian, law graduate, practicing attorney, legal representative of the Austrian Consul, newspaper editor; he was in 1914 by education, by occupation, by association and by his interests peculiarly well equipped to understand fully the consequences of what he said and did. His capacity for full understanding was beyond that of the average citizen. His sympathies were kept alive by his employment by the Consul, by editing a newspaper in his native tongue, and by the presence of relatives in Germany.

Such was the man whose sincerity is here in question. He had sworn allegiance to the United States in 1904; he had said under oath that he renounced

and abjured all other allegiance, and particularly he had put off allegiance to Germany.

By his own admission (Trans. p. 180) he was aware of the issuance by the President of proclamations of neutrality. In these proclamations is this language:

“And I do further declare and proclaim that the Statutes and the treaties of the United States, and the law of the nations alike require that no person within the territory and jurisdiction of the United States shall take part, directly or indirectly, in said wars, but shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

“And I do hereby enjoin all citizens of the United States and all persons residing or being within the territory or jurisdiction of the United States to observe the laws thereof and to commit no act contrary to the provisions of the said statutes or treaties or any violation of the law of nations in that behalf.

“And I do hereby give notice that all citizens of the United States and others who may claim the protection of this Government, who may misconduct themselves in the premises, will do so at their peril, and that they can in nowise obtain any protection from the Government of the United States against

the consequences of their misconduct.” (38 Stat. L. part 2, 2001-2024.)

These proclamations were issued in August, 1914.

What is allegiance? Its essence is fidelity. It is the “fealty or fidelity of a person to the government of which he is a citizen.” (2 CJ 1149) Fealty is “fidelity to one’s lord; fidelity; constancy; faithfulness” (Webster) Fidelity is “adherence to a person or party to which one is bound; loyalty” (Webster). Woerndle’s duty to America required of him fidelity, no more, no less. And it was a self imposed duty. He put it upon himself. No man asked him to renounce Germany; no man required him to become an American citizen. It was his own choice. When he had chosen, America asked but little of him, only fidelity; merely that he be sincere and honest in his voluntary oath.

The Supreme Court used this language in the Luria case, (231 U. S. 9-23) “These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself.”

Allegiance is not a thing of war time only. It is equally a condition of peace. Nor is it only in war that we see the signs by which we may know it, or find that it is absent. It is more readily discovered in war time. In peace, ordinarily, there is nothing to call for its expression; for it is largely a sentiment and not usually displayed in peace. It is hard to prove or to disprove until some conflict of interest between the mother country and the adopted country brings it to light. Such a conflict need not be actual war, if the needed probative facts are developed. When a conflict of interest arises, acts and words betray the real allegiance of the individual; and by them must his sincerity and fidelity be measured, for there is no other standard by which to gage them.

In October, 1914, Germany was at war; America was neutral. America's interests required that her neutral role be free from embarrassments; that she be not exposed to greater difficulties and dangers than were necessarily incident to her position as between the belligerents. It was the duty of every citizen so to conduct himself as to avoid putting America in jeopardy. This was Woerndle's duty. But he was in Portland with a German reservist, who wanted to go to Germany. Germany's interest was to increase her man-power; it required that her reservist return to join the armed forces. Woerndle clearly saw that

Germany's interest required that Boehm have an American passport. It was equally clear that America's interest required that Boehm not have the passport, that none have a passport except genuine American citizens going abroad on legitimate business. For already there were in Europe thousands of Americans looking to their government for its protection.

In Woerndle's mind, at least, the interests of Germany and of America came squarely in conflict in October, 1914. In this conflict what show of allegiance did he make? He used his American citizenship in aid of Germany, to increase her man-power. He violated the laws of the United States so that a passport could be obtained for a German military officer. He used a land patent issued by the American government—another privilege of citizenship—to enable the German Boehm to make false proof of his identity as an American citizen. In short, when the good faith of his American citizenship was put to the test, his conduct revealed that American citizenship was merely a cloak to serve his own and Germany's purposes, and that at heart he was not an American citizen.

On the first occasion that arose after his naturalization to test his fidelity, he multiplied the difficulties and dangers of America's neutral role by a fraud in-



tended to put upon America the duty of protecting as a citizen a German officer traveling through belligerent zones to join the German forces. His certificate of citizenship was another "scrap of paper," valuable only to the extent that it was useful in aid of Germany.

His conduct was against ordinary decency, it was against his oath, against his duty to America and against the law. He freely sacrificed America, and used all that America had given him, to aid Germany. He was willing to, and did, commit a felony—risked imprisonment in the penitentiary and attendant loss of his civil rights—to aid the country whose allegiance he had renounced. He admits that he knew as a lawyer, in 1914, that he was committing a felony (Trans. p. 180). He was willing to expose the United States to such grave international embarrassments as might have resulted from finding a German military agent traveling in the guise of an American citizen, with a passport valid on its face, and regularly issued by the Department of State, but in fact fraudulent because it was carried by Boehm and not by Woerndle, and this with Woerndle's connivance and aid.

This fraud was willful and deliberate on the part of Woerndle. Not only did he act without urging, but it was he who contrived the scheme. "The de-

fendant Woerndle on the witness stand in his own behalf testified that when he discussed the passport matter with Boehm in 1914, Boehm said he wanted to go to Germany, but could not because he could not get a passport, not being an American citizen, and that Woerndle offered Boehm, Woerndle's passport and other papers for identification." (Statement of Evidence Trans. p. 171.)

Woerndle sought to avoid the effect of this event by explaining that he was filled with anguish over the condition of his father and relatives in Germany, and that he only had in mind "to give what aid he could to the place of his birth, and to bring it to his father." (Trans. p. 174.) This explanation is contradicted by his own diary entries of October 2 and 3. This diary had been a daily habit for years, where he "wrote down occurrences and his feelings and thoughts." (Trans. p. 174) No note of anguish is in these entries.

"2. Had a grand dinner with Paul Wessinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty and make will.

"3. Boehm gave me power of atty and drew will. I will furnish him with pass— & U. S. citizen papers so he can travel in my name. Also

gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my address care Waldorf-Astoria, New York, where Boehm will call for it."

Are these the feeling and thoughts of a man torn with anxiety for his aged father? Of a man whose only motive in his fraud was to send a person to comfort the venerable parent in Germany?

Not the stain of a filial tear is on those pages. But rather the diary discloses a dinner where the clinking of steins was punctuated with "Hoch der Kaiser" and the chorus of "Die Wacht am Rhein," while gleeful plans were made for Boehm, and German hearts swelled with pride in the officer who was going back to fight for the Fatherland, and in the clever idea that he should go safely, protected and identified as an American citizen.

Woerndle did not even mention his father to Boehm, as is shown by a letter written by Woerndle to Boehm nearly two years later, July 14, 1916, in which he said:

"Do you in your travels ever get near Rosenheim, Bavaria? My folks live at Bernau am Chimsee. They would be glad, I am sure, if you could say 'Hello' for me." (Trans. p. 165.)

As was said by the Supreme Court in *Booth Kelly Lumber Co. vs. U. S.* 237 U. S. 481-486 "the explanations fail to escape the effect of the incontrovertible facts."

## THE LETTERS

During 1915 and 1916, Woerndle expected war between the United States and Germany. This is abundantly proved by the following statements in his letters:

May 14, 1915. "Judging from present conditions this country too will be involved in a war with Germany, loved, poor, unfortunate Germany." (Trans. p. 128.)

May 31, 1915. "Only God Almighty can save us from war with my own Fatherland." (Trans. p. 126.)

May 31, 1915. "And it now seems as if this country too wants to declare war on Germany." (Trans. p. 132.)

June 5, 1915. "This is perhaps the last letter I can send direct to you for if I am not deceived this country too tries to break with all force the peaceable relations with Germany, and if once diplomatic intercourse is suspended, a declaration of war will not be far off." (Trans. p. 139.)

July 26, 1915. "There is no more neutrality

or impartiality, for the second American note to the German Government shows without doubt that the American government wishes to paralyze the submarine warfare so as to play in this way into the hands of Germany's enemies." (Trans. p. 141.)

May 8, 1916. " . . . And it looks as tho he were lending every effort to throw our country into this war." (Trans. p. 157.)

These expressions show, so far as Woerndle's mind was concerned, a conflict of interest with the mother country practically equal to a state of war. That he was mistaken, that actual war did not come until April, 1917, does not matter. The probative value of his letters is equally great. We are trying the state of the man's mind, inquiring as to the sincerity and honesty of his oath.

If he believed war to be imminent and inevitable, his words were as expressive of his mental condition, as had war existed. These expressions and their effect, appear to have been entirely overlooked by the trial court.

Having in mind a state of war between the United States and Germany, Woerndle

1. Expressed strong affection for Germany (May 14, '15, Trans. p. 128; May 31, '15, Trans.



p. 126; June 5, '15, Trans. p. 138; July 26, '15, Trans. p. 141; Dec. 10, '15, Trans. p. 148.)

2. Condemned and ridiculed America (May 14, '15, Trans. p. 130; May 31, '15, Trans. p. 126-128; June 5, '15, Trans. p. 137-139; July 26, '15, Trans. p. 141-142; Nov. 26, '15, Trans. p. 146-147; Feb. 18, '16, Trans. p. 154; May 8, '16, Trans. p. 157).

3. "Would without hesitation sacrifice my all for loved old Fatherland." (May 14, '15, Trans. p. 129; June 5, '15, Trans. p. 138.)

4. Would have returned to Germany to aid it. (May 14, '15, Trans. p. 129.)

5. Hoped for Germany victory. (May 14, '15, Trans. p. 131; June 3, '15, Trans. p. 135-137; June 5, '15, Trans. p. 139.)

6. Would give his three boys to "my dear old fatherland." (May 31, '15, Trans. p. 133.)

7. Was ashamed of American action. (June 3, '15, Trans. p. 134; June 5, '15, Trans. p. 138.)

8. If over there would be in the trenches or on the battlefield, dead. (June 3, '15, Trans. p. 135.)

9. If there would be found on the firing line. (June 3, '15, Trans. p. 137.)

10. If in Germany would gladly allow himself to be put in uniform or otherwise be of benefit to the Fatherland. (June 5, '15, Trans. p. 139.)

11. Would not much regret being chased out of here as a German. (Nov. 26, '15, Trans. p. 147.)

12. Could not have much respect left for this country. (Nov. 26, '15, Trans. p. 147.)

13. Said "for Germany to do what the government here demands is unthinkable." (May 31, '15 Trans. p. 126.)

14. Thought the Emperor was "the greatest man that ever lived, the ablest soldier, diplomat and ruler." (May 8, '16, Trans. p. 158.)

15. Said that if America enters the war, "here too there will not remain one stone upon the other . . . for the blood-bath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe." (May 18, '16, Trans. p. 157.)

If these sentiments discharge the duty of a naturalized citizen, an oath of allegiance is mere nothing. If this is the fidelity that allegiance means, proceedings for naturalization are but vain pomp and circumstance. If naturalized persons are to be told by

Court decision that these things meet the obligations of American citizenship, it would be as well to repeal all naturalization statutes, and say at once that citizenship requires nothing more than residence in the United States.

These letters show a clear and decisive choice between the United States and Germany. They cannot be waived aside as merely the children of "sympathy with the land of his birth and anxiety for her success." (Trans. p. 117.) They express so powerfully his living affection for his native country as to leave no room for fidelity to America. They are not merely pro-German and anti-British, anti-French, anti-Italian; but they are pro-German and anti-American, and that in an atmosphere of war.

Woerndle's letters appear in full at pages 126 to 171, of the transcript. A reading of them must inevitably lead to the conclusion expressed by Judge Cushman (*U. S. vs. Herberger*, 272 Fed. 278-290) in a similar case:

"I have looked in vain for any note of reluctance in this self imposed task, he had set for himself, of abusing his adopted country. There is too much zest and gusto in the manner in which he goes about it for the court to conclude that he had not his heart in it."

The letters will not be repeated in full here, but those portions are copied which have to do with America and Germany.

"May 14, 1915, Dear Parents . . . this perhaps will be the last letter for some time which may reach you. Judging from present conditions this country too will be involved in a war with Germany, loved, poor, unfortunate Germany. Haunted and persecuted by the whole world, under all possible excuses made, belied and invented. What the outcome may be is a riddle, but at any rate the whole world will rise in rebellion and when everything will be over, there will not be very many people left. What bullet and sword will not take, pest and collera will claim. It is horrible to think about it. And yet we have here in the land of plenty no conception. If I were out there today as 3 years ago, I would without hesitation sacrifice my all for loved old fatherland, for now for the first and perhaps the last time Germany is depending on all help from child to dotard to save it from the claws of its arch enemy, England and its allies. I learn with shudder of the colossal sacrifices which Germany now makes and its people, but it is better, a thousand times, to die the death for Fatherland than to eke out an existence in the

shackles of the most sordid nation on earth, England. Were it not for my family here, I would have long ago returned to my old home to aid it in this time of greatest need, but as it is, such a thing is not possible. . . . The Americans, moblike, would be glad if it could get one over on Germany, but the German Michael will not have to be afraid very much. The United States are noisy, but when it comes to do something they are slow. This nation could not force ragged Mexico to salute the American flag. They will not risk to go to Germany, otherwise the Japanese may soon take possession of the best part of our coast, for they have aimed for it a long time. Our good President keeps shop open whenever it goes against the Germans, but whenever the English are guilty of anything, he is mum and blows the trumpet of peace. It fills me with with sorrow if our beautiful country should be drawn into this sad war, for the will of the masses and of the more sensible classes is not for it, but if it cannot be helped we will have to go to it, at least financially. Few Germans will shoulder arms, and of the others not many will put their head in front of a Howitzer and hence perhaps not everything will be lost at once. I am only sorry for the many human lives, but I may say to you, persevere to the last man



for as I hope victory will yet go to the Germans. . . .

5-31-15. My dear Mr. Hoerner: Reading the news as they come over from all sides, I am overcome with a feeling of sadness, and as it now seems, and judging from today's evening paper headlines, only God Almighty can save us from war with my own Fatherland. It seems now as if the American Government has lost its head or is about to lose it. What will all happen if this takes place is hard to imagine. One shudders by the thought. The good, beautiful land where my cradle stood, poor, poor, Germany. The sword in hand it is now fighting nearly against the whole world. I shudder at the thought. What will all yet happen and what will be the outcome. Sad enough that our Government supplies the English ragpack and others with shiploads of ammunition, but wants now also to declare war on Germany. Almost unbelievable, and yet it may come to pass. For for Germany to do what the Government here demands is unthinkable, because should they do that and call off submarine warfare, they may just as well ask for peace, for many hounds are the hare's death. But I hope it will not come that far. I cannot conceive how it is possible that Germany has

held out this far, without provisions and soldier supply from without. And yet I expect and hope that Germany will come out victorious. How that is possible I cannot imagine, but she will and must be victorious. . . . My youngest brother was already drafted last January. Has 5 children and a wife. Horrible, if one thinks about it. Maybe the same will happen to us here. People here as it seems, are about to lose their whole sense, and it is hardly believable that a country like ours, which has trumpeted out into the world the call of freedom and the protection of the weak, has stepped so low as to support a bloodstained, treacherous people like England, as it is now doing. But penalty will not remain away, and our neat Government will yet perhaps bitterly regret all. Him whom the Lord wishes to destroy, he smites with blindness, and the whole Wilson-Bryan Kraut will have a frightful responsibility for the millions of human lives destroyed thru our bullet manufacture. . .

"5-31-15. Dear Brother Kasper: . . .

How it now looks at home I have no idea, since Italy too, the treacherous, mutinous pack has declared war on Germany and Austria. It is horrible to think about it, and the outcome makes one shudder. Has Donat already been

drafted with wife and 5 small children at home. And it now seems as if this country too wants to declare war on Germany. Considering the great sacrifices this war has cost already, one can hardly understand that there are yet soldiers left, without new additions or other supply from without. One can only do one thing and that is to leave all to God Almighty. . . . Kasper, I have received the deed from Notary Weiss. I had it executed here and filed with my papers with a note, that if anything happens to me that it shall be sent to you. Kasper, I do not know if after the war is over I will not return to the land of my cradle, and if I should do so would want to build a house on the place. I have three boys and these would perhaps be needed by my dear old Fatherland after the war. When the war is over I will know more how everything is. . . .

“6-3-15. My dear Aunt: I received your dear letter just now and am very happy to have heard from you. I have written you twice already, but it seems that my letters have not reached you. I have not heard from you for a long time, and if you have written me, your letters did not get here. . . . It is horrible about this war and the end is not yet in sight, and how it ends no

one knows. I am ashamed of the action of the American government regarding Germany, for the people do not sanction these actions, but nothing can be changed. We do everything in our power to avoid the worst, but it's just like pouring water on a duck's back. But that America will be penalized for its double standard I have no doubt, just like Italy. My younger brother will already have joined the colors, since he was already drafted last December. Kaspar, the older one, is at home yet . . . If I were out there, I would also be found in the trenches or on the battlefield—dead—. For I would not stay away. We have just received the news that Przemyśl is fallen and in the hands of the confederates. What happy news but what against so many. We hope and pray that the Germans will win out in the end, but human strength only does not seem to make it possible. . . .

"6-3-15. My dear Aunt: . . . It is indeed horrible about this disastrous war, and I hope it will soon be over. The American way of dealing is much to be regretted and the consequences will not remain away. Just now news reached here that Przemyśl was again conquered by the Austrians, which news naturally has caused considerable rejoicing among the

Germans here. Otherwise everything is friendly towards England as far as the press is concerned, but not the people. Our ruling powers are related by kinship with the English aristocracy and there is where the dog lies buried. Could Washington rise from his grave he would be ashamed of our present administration, which as it appears, will do anything to play into the hands of our archfoe, England. And too Italy, this low treacherous band, has thrown herself into the arms of England. But she too will receive her reward for her high treason. Keep up hope, for God will righten everything, and Germany will and must be victorious. I have not heard from Father for some time and neither from my brothers. Donat was already drafted last December, and will no doubt be for some time on the firing line. And if I were out there, I would be found there too. . . .

"6-5-15. Dear Aunt: . . . Yes, dear Aunt, it is horrible about this war, and an end not yet in sight. And now too treacherous Italy is gone over to the other side and it seems to me that when this war is once over there will not be much young manhood left. I am ashamed of the action of the American nation for they can never make reparation for it, and yet in spite of all efforts



and work it seems that the labors of the Germans make no impression in Washington. Under separate cover I am mailing you a copy of my newspaper. My editorial (signed) just about illustrates the true situation here. You also notice my appeal for aid, but so much has already been collected from other sources, and the people on account of growing indifferent, are not donating very much anymore. I wish I had the means, I would be glad to give all to beautiful old Fatherland to aid it in this hour of need.

. . . I only hope that the Italians will get their neck broke for them and the English deserve the most. If I were in Germany as 3 years ago, I would gladly allow myself to be put in uniform, or otherwise be of benefit to the Fatherland. . . . How everything will come out, God only knows. What do you think about it? Do you think that the Germans will be victorious? God grant it! Here everything is stagnant, and business is at a standstill. Wilson with his half bankrupt machine is trying to polster up with ammunition, powder and bullet trade his miserable stewardship, but he will not succeed and in one and one-half years he will be out. This monster will not again be re-elected. And all in the most hypocritical fashion for "Human-

ity" and furthering of "Civilization." Such absurdity and hypocrisy. But he too will also get his reward. . . . This is perhaps the last letter that I can send direct to you, for if I am not deceived, this country too tries to break with all force the peaceable relations with Germany, and if once diplomatic intercourse is suspended, a declaration of war will not be far off. Then something may develop here of which we have no conception. . . .

"July 26, 1915. Dear Parents: I have just received your letter of June 30th and learn with great sorrow that Donat had to move to the front and that he is already 3 months incorporated in the field forces . . .

It is shuddering if one takes into consideration the many human lives which this war has already claimed, and yet will claim, but there is no turning back for Germany, for as a nation she would be gone if this war were lost. People here learn with admiration how the German people to the last man have collected around the flag and sacrificed the last drop of blood for the salvation of German honor and the German nation. A people like the German is not to be found in the whole world, and if one reads of the English labor strikes and the like, it fills one

with disgust, tho it be to the advantage of Germany; but one can see of what caliber the English are made. . . . Forward and forward is the battle cry until the last hostile flag covers the dust. The stand of our administration regarding the German course, is mildly said, regrettable. There is no more neutrality or impartiality for the second American note to the German government shows without doubt that the American government wishes to paralyze the submarine warfare so as to play in this way into the hands of Germany's enemies. How such a thing, considering the American war of independence with the same suppressor, England, is possible, is inconceivable and it seems that American gratitude is of short duration. . . .

"Nov. 26, 1915. Dear Brother Kaspar: . . . Times here are not the best and tho our administration tries to avert a crash with ammunition trade, nothing, it seems, is going ahead. There is no blessing in things of this kind, and the thought that this country has to enrich itself on thus acquired blood money is not less horrible, but retribution will here also be in its wake, and the proverb, 'As won so lost,' will also here hold good.

"Regarding my piece of land would say that

both of you can use it. . . . I shall have the deed which you sent me acknowledged before a consul and will then send it to you. But, dear Brother, I am doing this so you have it on hand in case something should happen to me, which no one knows, but only in case of my death I want you to inherit this land. As long as I live myself I may need it perhaps to build a house on it and to live in it if the Germans once should be chased out of here. Would not be regretted much for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left. . . .

“Dec. 10, 1915. My dear Brother: . . . I expect eagerly every day the news edition, thinking that every hour may bring armistice and negotiations of peace, and yet that time is yet somewhat off. Victory for Germany too means much for us, for you have no idea how much the of the war and a German victory means the German population and business world under present circumstances has to suffer, for the end resurrection of German influence in the whole world and would without doubt help us here too immensely. . . . It is almost unbelievable and sounds like a fairytale, hard to believe, and only God's help, faith, German unity, belief, hope

and denials have made it possible to achieve victory over the whole world. Here we did our best with money, agitations, etc., etc., but with an administration as we have it, not much can be accomplished. Only last week we held a Red Cross bazaar, and netted over \$3000, and throughout the whole United States people are busy working so that as much as possible can be done for the old Fatherland. I hope that the war will soon come to an end so that everything will again liven up and begin anew. . . .

"Feb. 18, 1916. Dear Sister-in-law: . . . Here times are miserable, at least out West. In the East things go somewhat better because the people have more work (perhaps in the ammunition factories). A shudder overcomes a person when one thinks that for filthy money millions of dollars worth of shrapnels are manufactured to slaughter thousands of young human lives. But all protestation appears to be fruitless. What visitations God Almighty reserves for us remains to be awaited, but we as Americans can surely expect no blessing for it. . . .

"May 8-16. My dear Brother: . . . I cannot understand that the stupid French cannot see that they are in vain sacrificing their sons to salvage damned England's chestnuts from the



fire. And that our country too should offer herself for cursed gold to furnish tools of murder to blow hundreds of thousands of human lives out of existence. We protest, telegraph, argue, and do all we can, but all our efforts seem to have no effect upon the Administration in Washington. And an end not yet in sight. Our can never repair for the curse of his deeds, for it seems as if he has sold his soul and body to the devil and his ally England, and it looks as tho he were lending every effort to throw our country into this war. But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the bloodbath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe. This monster of a president seems not to notice the bloody handwriting on the wall, but it will be that much more red when the hour comes, and he shall persist to throw this country into the mouth of inhumanity and war. I hope it will not come that far and that the good common sense of the American people will not leave them at this hour. . . . The whole world admires the Emperor, for he is perhaps the greatest man that ever lived, the ablest soldier,

diplomat and ruler, and I hope he will succeed to lift the world back upon its axle. If he can't do it, nobody else can.

"And now, dear Brother, remain true to your flag and your fatherland, do not lose courage and God will never leave you. I will do everything in my power to help at home and otherwise.

**"GOD WILL NOT DESERT THE GER-  
MANS."**

Such was Woerndle's fidelity. In his mind was the picture of war between the United States and Germany. Such were the expressions of his sentiments when he foresaw that war. How far is this from the true faith of genuine allegiance? In contrast the words of Judge Hunt stand out sharply. (Hauge vs. U. S. 276 Fed. 111-113, 9 CCA):

"What finer test of the disposition of one who wishes to be naturalized can be conceived of than to ascertain whether he is willing to support and defend the nation in time of war? How can one be really attached to the principles of the Constitution and be well disposed to the good order and happiness of the nation, and attempt to escape from the obligation to defend the country, on the ground that he is an alien

and willing to return to his native country and enter its military service?"

Judge Hunt was speaking of neutral alien declarants who were seeking naturalization. Such men are denied citizenship if they claimed exemption from military service on the ground of alienage.

If this is the test of their feelings toward America as prospective citizens, what is to be said of the alien who has actually become a citizen and taken the oath of allegiance?

What of the citizen who in one breath proclaims war between the United States and Germany, and in the next says he would gladly don the uniform and fight in the trenches of Germany?

What of the citizen whose vision of such a war impels him to say that he would not much regret being "chased out of here" as a German, "for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left"?

What of the citizen who, in the same letter, pens these two sentences: "And it now seems as if this country too wants to declare war on Germany . . . I have three boys and these would perhaps be needed by my dear old Fatherland after the war."

Is that man "willing to support and defend the

nation in time of war," (quoting Judge Hunt) who says in anticipation of war: "But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the bloodbath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe."?

What is to be said of the man whose citizenship is of so little moment that he voluntarily faced a felon's cell to make that citizenship add to the manpower on the German front?

Was it such as he that inspired the Court to say (In re Loen 262 Fed. 167-168).

"Interpretation of the oath of allegiance is more than a mere formula of words. It is the translation of the alien applicant for citizenship from foreign language, foreign history, foreign ideals and foreign loyalty into a living character of our language, of our history, of our life, of our ideals and loyalty to our flag. It is that intellectual, spiritual, patriotic development of love for the United States, his adopted country, and its Constitution and laws, which moves him in sincerity to dedicate his life to its service and conscientiously agree to defend it against all enemies, and the implanting in his soul of a sincere determination that in the hour of danger

or attack upon the Constitution or the flag, to devote to their defense and support unlimited loyal service to the extent of his life, if required. Any person unwilling to pledge his hands, his heart, his life to the service and preservation of the Government of the United States, first and always, is unworthy to be admitted to citizenship."

Does an oath of allegiance thus bind a man to loyalty? Or is every citizen free to act and speak as Woerndle did? Had every citizen that license, how long would the nation endure?

The significance of Woerndle's letters is obvious; so plain that argument seems superfluous. Woerndle himself was so conscious of their damning effect that he sought to repudiate them by saying he didn't mean what he said. He merely wrote those things to placate the German censor. (Trans. p. 176.) A ridiculous explanation. It is neither ingenious nor ingenuous.

Woerndle had little cause to fear the German censor. His bete noire was the British censor. It was the British who took American mails off ships, opened and inspected them, and disposed of them at their pleasure. This practice was pressed so far that it led to formal diplomatic protest by the American government. Mr. Lansing, on January 4, 1916, in-



sisted in a note to Great Britain that "mails are not to be censored, confiscated or destroyed on the high seas, even when carried by belligerent mail ships." The British defended their course, April 4, 1916, as a means of intercepting war material destined for Germany, and cited as an instance that as much as 800 pounds of rubber had been sent in a single parcel post. (28 *The Americana* 618.)

The American protest was renewed on May 24, 1916, and the allied governments joined in a long note under date of October 15, 1916. This note asserted the right to open and inspect mail, to have mail bags landed from ships and sent to centers properly equipped for inspection, as a necessary precaution against German wiles. The Allies insisted strongly on their right to confiscate remittances of money, and added: "Nothing, in the opinion of the Allied Governments, seems to justify the liberty granted to the enemy country so to receive funds intended to supply by that amount its financial resisting power."

That the Allies were determined to continue their seizures of mail is thus expressed in the final paragraph:

"Furthermore, should any abuses, grave errors or derelictions committed by the Allied authorities charged with the duty of inspecting

mails be disclosed to the Governments of France and Great Britain, they are now as they ever were ready to settle responsibility therefore in accordance with the principles of law and justice, which it never was and is not now their intention to evade." (17 Messages and Papers of the Presidents 8165-8169.)

This conduct of the British was known to every one in the United States at that time. The newspapers discussed British mail seizures; men talked of it on the street. It was common knowledge. Every man knew it, and Woerndle could not have failed to know it; more especially because he had a lively interest in the matter born of his desire to communicate with his relatives.

Yet he testified that he put the disloyal comment in his letters merely as an expedient to get the letters, with his remittances, past the German censor. And that he used the same method in writing to Hoerner, a German banker, through whom remittances reached his father. (Trans. pp. 176-177.) He had reasoned this out from his own powers of deduction. (Trans. p. 180.)

Viewed from the angle of the German censor, we find Woerndle's explanation equally absurd. The German censor obviously had as his chief objects to prevent the work of spies, to keep military secrets

from reaching the Allies, to influence neutral opinion favorably to Germany and last but not least, to maintain the war morale of the German people. The German censor was not an obstacle to Woerndle; but had he been so, can we believe that he was likely to be put in a good humor by reading that the United States was on the point of entering the war, that only God Almighty could prevent it, that a new and powerful foe was to join the Allies against Germany? Or that the German censor would pass such news to the German people to threaten that morale which the German Government labored so hard to maintain? Could any man in Woerndle's position reasonably believe it, then or now?

The truth is that these letters cannot be explained away. They are convincing in their portrayal of a German heart and mind. Woerndle's attempt to explain was the desperate resource of a man brought to face his own condemnation in his own words. His explanation is so far from being reasonable that it is ridiculous; and any other attempt he might have made to explain would have sounded equally silly.

When the German Herberger (272 Fed. 290) abused America, he was "trying to comfort his sister." The German Woerndle abused America and praised Germany with such enthusiasm as to justify the repetition of Judge Cushman's language in the

Herberger case: "There is too much zest and gusto in the manner in which he goes about it for the Court to conclude that he had not his heart in it."

This Court recognized in the Schurman case (264 Fed. 919) the possibility that a man may honestly renounce an allegiance, and later honestly change his views. No such candor of opinion is claimed by Woerndle. He denies that he held the views expressed by him in his letters, and reflected by his conduct with Boehm. But if his conduct and letters were the expression of a genuine feeling, as they undoubtedly were, then he was not honest in repudiating them, and his denial was only one more attempt to deceive the Court. Such a deceit shows that he was guilt conscious and but emphasizes the disloyal acts and words which he thus repudiates; and thereby force is given to the contention that he never abandoned his allegiance to Germany.

These letters, following the Boehm passport fraud, establish clearly that Woerndle in 1914, 1915 and 1916 had no allegiance to the United States. His mental attitude during those years is thus fixed beyond question. From it, can we determine his mental attitude in 1904, when he was naturalized? Normally, his affection for Germany weakened with increasing years of absence; and his affection for America grew with lengthening years of residence

here. The ties that should have bound him to America ought to have been made stronger by his material prosperity here, by his marriage to an American wife, by the birth in America of three sons—the same three boys who “would perhaps be needed by my dear old Fatherland after the war.”

Therefore, when we show his allegiance in 1914-1916, it follows naturally that this allegiance was stronger ten years earlier, in 1904. He loved Germany more in 1904 than in 1915—he loved America less in 1904 than in 1915. This has been recognized by many courts. This Court said in the Schurman case, 264 Fed. 920 (naturalization in 1904):

“One who spoke in that way, and whose frequent expressions were so plainly against the United States and in favor of Germany, must have taken the oath of full faith and allegiance with a reserved determination, to be kept down, but nurtured, until a momentous time might come. In years, however, the time did come, and the criterion of original fraud must be the later conduct, which, in its relation to the earlier attitude, will furnish safe ground for judgment.”

In *United States vs. Darmer*, 249 Fed. 989-990 (naturalization in 1888), the Court said:

“As attachments generally are weakened by length of time and absence from the cherished



object, the contention that it is more likely that it was stronger then than now cannot be said, in the absence of explanation, to be altogether unreasonable.”

In *United States vs. Wursterbarth*, 249 Fed. 908-910 (Naturalization in 1882), the Court said:

“As the years succeeding his naturaliation passed, coupled with the fact that he continued to dwell in our midst, associate with our citizens, receive the benefits which this nation and its institutions have conferred upon him, acquire property here, and hold public office . . . it is natural to presume that his affection, and feeling of loyalty and allegiance to this country would increase, and that any ties which bound him to the country from which he came would correspondingly decrease.

“If therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained toward that country an allegiance which the laws of this country re-

quired him to renounce before he could become one of its citizens. Indeed, for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present."

In *United States vs. Herberger*, 272 Fed. 278-289 (Naturalization in 1912), the Court said:

"There is a well known rule that, a state of facts once shown to exist, the same will for a reasonable time be presumed to continue, unless the contrary is shown. There is no more reason for this rule than there is for the converse; that is, that the existence of a condition being shown, in the absence of a showing to the contrary, it will be presumed to have theretofore existed for a reasonable time. No good reason appears why such a rule should not be applied where the state of mind of an individual is in question.

(291) "Loyalty or allegiance is, necessarily of slow growth; therefore somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may

not be fully realized at the time of their naturalization, renders it none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter."

In U. S. vs. Kramer, 262 Fed. 395-397 (5CCA), the Court said:

"If mere removal (from the United States) is sufficient evidence of fraud, why not subsequent acts of disloyalty, or statements indicating his want of allegiance? . . . In a criminal case, a man's intention may be judged by his acts. A conspiracy to defraud is usually proven by showing what the defendant did **after** the date upon which the conspiracy is alleged to have been formed, and the jury may consider such evidence in opposition to the testimony of defendant on the question of intention, and render a verdict of guilty upon it. Why not the same rule in a suit to cancel a certificate of naturalization?

"American citizenship is a priceless possession, and one who seeks it by naturalization must do so in entire good faith, without any mental reservation whatever, and with the complete intention of yielding his absolute loyalty and allegiance to the country of his adoption. If he does not he is guilty of fraud in obtaining his certificate of citizenship . . .

“ . . . . The proof makes out a prima facie case of the disloyalty of the defendant and shows his continuing allegiance to the German Emperor. We think the Court might well have rested a judgment of cancellation upon it, and it was error to dismiss the bill.”

Disloyalty is thus held not to be conclusive, but to establish fraud, in the absence of explanation. The cases are uniform to this effect. They put the burden of explaining upon the defendant. The Wursterbarth case goes so far as to say that doubts should be resolved in favor of the government.

What explanation did Woerndle make? Simply a denial. He denied that he meant the things he wrote, but as has been shown, his denial is contradicted by the tone of the letters themselves and was coupled with a reason why he wrote them (to please the German censor) that is so fanciful that it cannot carry conviction. He assigns a reason for his passport fraud (anxiety for his father), but this is belied by his own dairy and by his letter to Boehm two years later, asking that he go and see the father. The trial court characterized the passport fraud as “indefensible.” (Trans. p. 116.)

Unless Woerndle's reasons for writing his letters and aiding Boehm are believed, the case is denuded of explanations by the defendant. And in the ab-

sence of explanation, Woerndle's disloyalty establishes fraud under all the authorities and by every impulse of reason and common sense. "The criterion of original fraud must be the later conduct," as was said by Judge Hunt.

The trial court did not believe Woerndle's explanation of the passport fraud, for it was characterized as "indefensible." The opinion discloses that the trial court did not credit the German censor explanation of the letters. But the court misapprehended the effect of the disbelief of Woerndle's explanations.

It therefore appears that the trial court erred in determining the effect of uncontroverted facts, and that a sufficient case for cancellation of Woerndle's citizenship was made.

There remains the effect of Woerndle's conduct after February 1, 1917. We have seen what he said and did in the three preceding years. He was actively disloyal, when he believed America's entry into the war was imminent and inevitable. The dismissal of Ambassador von Bernstorff on February 3, 1917, and the subsequent declaration of war presented to his mind no new subject for thought. For nearly two years he had taught himself to contemplate this reality. In the light of his vision of war between the United States and Germany were conceived and delivered his vehement words of hostility against the



United States and of adherence to Germany. This condition of mind is presumed to exist for a reasonable time thereafter, unless the contrary is shown.

But from the first of February, 1917, there is no evidence of any repetition of such acts or words. Why? Was his heart changed so that he was thereafter loyal to America? Or was there a strong reason that sealed his lips and caused him to make a show of loyalty in his own interests? The truth is that in his disloyalty he had violated the law and had perpetrated the passport fraud with Boehm. On February 1, 1917, Boehm was arrested, still masquerading as an American. The Government then began an investigation which, as seen by Woerndle, was likely to expose him, as in fact, later it did. To protect himself, he concealed evidence which would fasten upon him the guilt, not alone of having been implicated in Boehm's original passport fraud, but as well that of being the man in whose mind the corrupt scheme had its birth. For by his own admission, it was he who proposed to Boehm the fraud; it was he who suggested that he give Boehm his certificate of citizenship, and land patents for identification. (Trans. p. 171.)

Thus guilty and thus conscious of his guilt, thus fearful of the consequences and anxious to escape them, can his later conduct have any probative value

favorable to him? In the light of all the facts and circumstances, it can not fairly be said that Woerndle was loyal to America; but rather that he was seeking to divert suspicion from himself.

Two days before the dismissal of von Bernstorff was made public, Woerndle read in the Portland Oregonian a dispatch which was of great concern to him. It was this:

### “PASSPORT CASE PROBED

---

### “EXTRADITION OF CAPT. BOEHM IS CONSIDERED

---

“All Persons Connected With Issuance of Papers  
to German to Be Called to Account  
by Washington.

---

“Washington, Jan. 31.—State Department authorities today began a thorough investigation into the issuance and alleged improper use of American passport in the name of Jelks Leroy Thrasher, with which Capt. Hans Boehm, said to be a German army officer, was traveling from Spain to Holland, when taken off the steamer at Falmouth and placed under arrest by the British authorities.

“Work also was begun on new passport

regulations which will be issued in a few days to throw further safe-guards around their issuance and to prevent their use improperly.

"All persons connected with the issuance of the Thrasher passport either have been or will be called to account by agents of the Department of Justice.

"Legal officers of the Government are looking into the question of extraditing Boehm to the United States." (Trans. p. 121-122.)

The next day, February 2, the trail led to Portland, where Woerndle lived. The Oregonian said:

#### "BOEHM KNOWN HERE

---

"MAN HELD AS GERMAN SPY IS FORMER PORTLAND MAN—WIFE'S RELATIVES HERE

---

"Position Held With Hotel and Several Clubs in City and Partnership Is Still Held in Business Enterprise.

---

"Captain Hans Boehm, who is accused of traveling as an agent of the German government with an American passport bearing the name of Jelks Leroy Thrasher, and whose case is undergoing a rigid examination by the State Depart-

ment, is well known in Portland." (Trans. p. 122-124.)

Conscious of his own guilt and fearful that the investigation now inevitably directed toward Portland, might lead to his door, Woerndle remembered the diary recital of the "grand dinner" with Wessinger and Boehm where Boehm declared his purpose to join the colors, and that Woerndle furnished Boehm with citizenship papers and land patents for identification. He determined to conceal this evidence against him, and prepare a defense in case Boehm's use of his passport might be discovered.

Thereupon he cut out the original page, wrote another, and substituted it. The original and rewritten entries are here repeated.

#### Original Entries

#### As Rewritten

"2. Had a grand dinner with Paul Wessinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty. and make will.

"3. Boehm gave me power of atty. and drew will. I will furnish him with pass— & U. S. citizen papers so he

"Had a grand dinner with Paul Wessinger . . . and H. W. Boehm. Maybe I can't go with Boehm after all, but he says he will go in spite of hell. I only pity my poor father, but then my own family and children. Cecelia does not want me to go and maybe I won't, but I can't just stay. At any rate I will get my passport in shape so

can travel in my name. Also gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my address c/o Waldorf Astoria, New York, where Boehm will call for it."

as to have that part ready if I should decide to go. Wrote to Sec. of State to forward my pass to Waldorf Astoria Hotel where I will call for it. Boehm urges all he can for me to go with him. Maybe I will but there will be a surprise when I am gone."

His training as a lawyer, his experience as a Consular representative, his information as a newspaper editor, and his own guilty conscience all warned him of the danger in which he stood. His desire to shield himself is apparent. The next day (Feb. 3, 1917) the situation was made more tense by the dismissal of the German Ambassador.

These events, coupled with the showing of his previous state of mind, show clearly that from February 1, 1917, Woerndle's conduct was inspired by fear of prosecution and his desire to escape it, and though he made a show of loyalty to the United States, it cannot have any value to him. His acts cannot be said to have been moved by loyalty.

The facts here discussed are admitted. Most of them are recited in the stipulation of facts (Trans. p. 63-112) and the others for the greater part are Woerndle's admissions on the witness stand. This



Court is not asked to review findings made by the trial court on conflicting testimony, aided by personal observation of the witnesses.

In *Ridings vs. Johnson*, 128 U. S. 212-218, the Supreme Court said:

"On an appeal in an equity suit, the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided."

In *Waterloo Mining Co. vs. Doe* (9CCA), 82 Fed. 45-51, this Court said:

"It is further urged by appellees that this Court is bound by the findings of fact of the Circuit Court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the Court and it is bound to decide the same, so far as it is in a condition to be decided, on its merits. . . . It is to be observed, however, that the findings of fact by the Circuit Court are not without some weight in considering the merits of the case. This case therefore is presented to the Court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the Circuit Court."

In *U. S. vs. Booth-Kelly Lumber Co.* (9CCA), 203 Fed. 423-429 (affirmed 237 U. S. 481), this Court said:

"The findings in the court below were made upon evidence which had been taken before an examiner, and not in open court, and they are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witnesses."

The Supreme Court examined this case on its merits (237 U. S. 481-484) and affirmed the Circuit Court of Appeals, which had reversed the District Court.

In the case of the Santa Rita (9CCA, 176 Fed. 890-893, this Court said:

"In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libelant's principal witness, who gave direct evidence thereon, testified by depositions. Upon this matter therefore, the trial judge had not the advantage of seeing and hearing the witnesses. His position to arrive at a true result was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of a finding or the written testimony relates to matters as to which the trial court is better able to reach a satisfactory conclusion than the appellate court, the

finding will be adhered to, does not apply with the same force."

We challenge the effect given by the trial court to the uncontroverted facts, to the gratuitous passport fraud, and to the expressions in the letters. Woerndle admits that he wrote them—it was stipulated that he wrote them. They are his acts and words for a period of time from October, 1914 to May, 1916, admittedly his, and unexplained save for his statement that he did not mean what he said, if that may be dignified by calling it an explanation.

They are the measure of his allegiance to the United States when the interests of this country came into conflict with those of Germany, when he fully believed that conflict to be so serious that war was inevitable. Under the facts and the law, it is confidently affirmed that Woerndle's oath of allegiance was a fraud upon the court which admitted him, a fraud upon the United States, a fraud upon every loyal citizen, both native and naturalized, and a fraud upon every brave man in American uniform whose blood was spilled on the battlefields of Europe.

Woerndle is one of the class denounced by President Harding in his recent message when he spoke of "those who take on the habiliments of an American without knowing an American soul."

### The Stipulation

If the question is in the record, a contention will undoubtedly be made that the court has not the right to consider the recitals in the stipulation of facts as to the contents of Woerndle's letters. This contention will rest upon the search of Woerndle's house and office under search warrants issued on affidavits which did not meet the statutory requirements. No book, paper or document taken on the search, nor any copy thereof, was offered in evidence. The government offered only the stipulation of facts.

The stipulation said (Trans. p. 63) "at the trial of the above entitled cause the facts hereinafter stated shall be taken and deemed to be true; that no evidence thereof shall be required to be offered or produced by either of the parties hereto, and the parties hereby expressly waive any and all objections of every kind as to the manner of proof and as to the sufficiency of the proof of the facts hereinafter stated. All other objections as to the competency, relevancy and materiality of these facts are reserved."

Then follows a recital of facts touching Woerndle's birth, immigration and naturalization, his acquaintance with Boehm and the agreement between them about the passport, that the passport was applied for by Woerndle for Boehm's use, the diary entry of October 3, the actual use of the passport by

Boehm, the cutting out of page 109 of the diary and the substituted entry. After covering the passport episode, the stipulation proceeds: (Trans. p. 67) "Constitutional and statutory rights and objections of defendant in reference to the following letters are reserved." Then translations of the letters are set out in full. No other evidence of the letters was used.

Thus the stipulation expressly waives any and all objections of every kind as to the manner of proof and as to the sufficiency of proof of the facts therein stated, and reserves all other objections as to the competency, relevancy and materiality of those facts, as well as constitutional and statutory rights and objections of defendant in reference to the letters. In view of an express waiver of this kind coupled with a statement of reserved objections, it is difficult to see how the reserved objections could be enlarged during the reading of the stipulation, as was attempted by making oral objection to the letters as "incompetent, irrelevant and immaterial, and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in violation of the 4th and 5th amendments to the Constitution of the United States." (Trans. p. 171.)

But in any case, if this question is to be considered, it can affect only so much of the stipulation as



recites the letters. The point is not presented as touching the passport fraud and the diary entries relating to it; for it is after the recital of these things that the stipulation says: "Constitutional and statutory rights and objections of defendant in reference to the following letters are reserved" and the oral objection above quoted, made during the reading of the stipulation at the trial, was directed only to the recital of the letters.

Had any of the letters seized, or copies of them, actually been received in evidence, over a proper objection, a different question would be presented. That was not done. Defendant is in the position of saying: I stipulate that I wrote certain German letters, of which these are correct translations, but the court can not consider my stipulation, because the government, in a search which was not valid, laid hold of copies of these letters.

This assumes that the government got the information about the letters shown by the stipulation solely from the search. The record does not so show. So far as appears from the record, the government had other sources of information about these letters; and the search merely confirmed what was already known. Indeed the affidavits for search warrants, although insufficient in law, disclose enough detail to show that considerable information about Woernle had reached the government before the search. (Trans. p. 39.)

This may have been through individual informers who were close to Woerndle; it may have been through the now well known activities of the British censorship. It is common knowledge that masses of information about Germans which the British collected were placed by them at the disposal of the American government. It is entirely within the probabilities that knowledge of Woerndle's letters came through such a channel. The record does not show that this was so; neither does it negative these probabilities. And unless the record discloses that the search was the sole source from which the government drew its information, defendant cannot challenge the right of the court to consider the facts he has stipulated to be true.

In *Silverthorne Lumber Co. vs. U. S.*, 251 U. S. 385-392, it was said, discussing the 4th Amendment:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the

way proposed. (*Subpoena duces tecum.*)

Therefore, the individual informer might have been called as a witness and the search would not bar his evidence. The British censorship might have been brought in, if the practical difficulties in the way of such proof could be surmounted, and the search would not bar the evidence. The facts are not "sacred and inaccessible." A stipulation of facts is but another form of evidence. So when defendant chose to stipulate the facts, as he did voluntarily, the search does not bar this form of evidence; when it does not appear that the government is thereby enjoying the advantages of a forbidden search.

The affidavits for search warrants appear at Pages 39 and 43 of the transcript. In the court below, on motion for the return of the things seized under search warrants, no objection was made by the United States Attorney, because the affidavits do not contain the material required by the statute. This is what defendant's counsel refers to in his oral objection (*Trans.* p. 171) when he speaks of "admittedly invalid search warrants." The failure to comply with the statute was not gratuitous, as will be seen by reading the affidavits. From the statements therein, it is apparent that the affiant had knowledge of details which would have enabled him to make a proper affidavit, had the person who prepared the

affidavit been more careful in advising himself about the requirements of the statute before setting out to draw the affidavit. The principal vice of the affidavits is that affiant is made to say "that he has good reason to believe and does verily believe" that certain property used to commit a felony was at Woerndle's house and office; and probably the statement of facts as to the commission of the felony is meager. However, the search warrants were not defended in the court below, and it is not the intention to defend them here.

We have thus far examined the record made for the saving of this question. Let us now see what sort of proceeding this is; for a criminal case or a suit for penalty or forfeiture is one thing, and an ordinary civil suit in equity is quite another. The nature of a suit to cancel a certificate of citizenship is determined by *Johanessen vs. U. S.* 225 U. S. 227-

242; *Luria vs.* 231 U. S. 9-24; and *U. S. vs. Ellis*, 185 Fed. 546-549.

In the *Johanessen* case the Supreme Court said: (225 U. S. 242)

"The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges . . . But the act under consideration inflicts

no such punishment, nor any punishment, upon a lawful citizen. It merely provides that, on good cause shown the question whether one who claims the privileges of citizenship under the certificate of a court, has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings. The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after a fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his."

In the Luria case it is said: (231 U. S. 24)

"the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate ju-



dicial proceedings, of merely colorable letters of citizenship to which their possessors never were lawfully entitled."

In U. S. vs. Ellis, 185 Fed. 546, 549 the court said:

"Public policy requires that no one should be naturalized except he be in the utmost good faith, and in enacting section 15 of the Act of 1906, Congress has done no more than to accentuate what was already apparent, and it has not thereby deprived a naturalized citizen of a vested right nor imposed any penalty upon him."

It therefore appears that this suit is not criminal nor quasi criminal, it is not a suit for a penalty; and it is not a suit for a forfeiture, for that is a proceeding in rem.

Therefore it is to be determined by the law and evidence governing civil causes. The government's case is fully made by the passport fraud alone. The letters are cumulative, but when their weight is added to the passport fraud, the conclusion is irresistible that Woerndle never abandoned his loyalty to Germany; that his oath of allegiance to America was mere lip service which had no response in his heart, and as such was a fraud upon the Court before which he was naturalized.

Respectfully submitted,

LESTER W. HUMPHREYS,

United States Attorney.



IN THE

**United States Circuit Court  
of Appeals**

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,  
Plaintiff, Appellant,  
vs.

JOSEPH WOERNDLE,  
Defendant, Respondent.

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**BRIEF OF RESPONDENT**

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Upon Appeal from the United States District Court  
for the District of Oregon.

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JOHN S. COKE,  
United States Attorney for Oregon,  
for Appellant.

C. T. HAAS,  
Attorney for Respondent.

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**FILED**

FEB 5 - 1923

**F. D. MONCKTON**  
CLERK



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## STATEMENT.

This is a suit to cancel the citizenship of the defendant herein. After hearing the evidence, the trial court dismissed the bill, stating in its opinion among other things:

"There is no evidence of a single act, statement, or conduct indicating allegiance to or sympathy with Germany after the entry of the United States into the war, but all the evidence is to the contrary, I have not been referred to a case in which a certificate of naturalization has been cancelled and set aside upon such proof, nor have I been able to find one."

(Trans. P. 116).

The act of the defendant on which the government based its suit occurred in 1914, and a reading of the Bill of Complaint and the affidavit attached thereto clearly show that the only accusation made therein was that of furnishing a passport to one certain Hans Boehm. No complaint of any kind was made at that time of any action of the defendant's in writing the letters which now appears to be the principal contention of the appellant.

In order to bring the admitted facts before the court, a short chronological history of the case is necessary.

October 1914—Defendant furnishes his passport to Boehm for purposes hereinafter stated.

December 1918—The Government through an admittedly void and illegal search warrant (Trans. P. 48) made a forcible search and seizure of the defendant's home and office and seized a truck load

of private memoranda, letters, papers and other personal property.

April 1921—(Seven years after happening of offence complained of.) The Government files a Bill in Equity to cancel the citizenship of the defendant by reason of his action in 1914.

Thereupon defendant filed a motion to dismiss the complaint on several grounds, including (a) "That it appears on the face of the bill of complaint that the facts alleged therein do not constitute a cause of suit or entitle the plaintiff to the relief therein prayed for. (b) Because the cause of suit as alleged in the said bill of complaint has not accrued within five years next preceding the filing of the complaint as required by law and it so appears from the face of the bill of complaint. (c) That said bill of complaint was not filed in the said court within the statutory period required by law and it so appears from the face of the bill of complaint. (d) That the affidavit attached to said bill of complaint did not show good cause therefor as required by law." (Trans. P. 26).

This motion was overruled in toto by the trial court and defendant was required to answer, which he did, setting forth as part of his answer the identical motions heretofore described.

Immediately after filing his answer, the defendant filed a motion "For the Return of Private Papers, Books and Documents" (Trans. P. 33), which motion not only requested the return of originals, but also "any and all copies, stenographic or photographic or otherwise made thereof." At the hearing of

the motion the United States District Attorney in open court admitted the illegality of the process which had secured these documents for him in violation of statutory and constitutional provisions and made no objection to the motion as far as the originals were concerned, and the court ordered their return, but on objection of the District Attorney the court refused to order the return of any or all copies made of said originals (Trans. P. 38) and shortly thereafter the court ordered the production at the trial of the identical documents heretofore ordered returned to the defendant (Trans. P. 60). At the trial these documents and particularly a number of letters were introduced in evidence over the objections of the defendant (Trans. P. 67) made at the trial and also reserved in the stipulation. These letters were considered by the trial court and disposed of with the following comment:

“It all relates to his (defendant’s) acts and statements in private letters and memoranda after the commencement of the war between Germany and England and several months prior to the time the United States became involved therein. It should be interpreted in the light of this fact and not that of subsequent events.” (Trans. P. 116.)

The facts as the appellant states were not disputed, but they were not for the greater part stipulated, as the defendant testified in person and offered himself for cross-examination to the court and prosecution, and the defendant’s testimony, which facts as well as the others, as the appellant states were not disputed, show among others the follow-

ing: That with the exception of the first passport furnished to Boehm by the defendant practically all the other actions of Boehm in the matter were without the defendant's knowledge or responsibility. (Trans. P. 121).

That the defendant, the child of poor parents, was only enabled to secure an education through the self-sacrifice of his father and brothers and that at the age of sixteen the defendant applied for and was given a certificate of expatriation renouncing his German citizenship; which certificate deprived him from all vestige of German citizenship (Defendant's Exhibit A. and Trans. P. 172).

That the defendant was opposed to the German military system and that therefore in 1897 he went to the United States, and that from the first dollar he earned he contributed to the support of his father and brothers in Germany until finally he was their entire and sole support; that he married an American girl and is now the father of three children and that neither his wife or children understand or speak the German language (Trans. P. 173).

That after receiving letters from home, after the outbreak of the European war, and realizing the hardships and suffering of his people in Germany, he wanted to go to his father's assistance, but that the defendant could not go on account of his family here, and that when Boehm offered to go, he let Boehm have his passport; that he did not consider the consequences of the passport incident in connection with the United States; that he had only in mind to give what aid he could to the place of his



birth and to bring aid to his father. (Trans. P. 173-174.)

That at that time defendant had two brothers in Germany, one with five children, the other with seven; that there then was no one at home to take care of his father and step-mother and that his parents were in want all the time, and that the defendant received letters from his father imploring him not to forsake them in their misery. (Trans. P. 175).

That the defendant wrote many letters to his relatives enclosing remittances, but none were delivered; that therefore he was willing to resort to almost any means to get word to his relatives and this gave him the idea of showing sympathy for the other side and saying many things merely to expedite things and get the letters through the German censor. (Trans. P. 175-176.)

That after the United States entered the war, the defendant did everything he knew to be helpful or useful to the United States; that he made reports to the United States Attorney "whenever anything didn't look right," and that the records of the United States Attorney's office show the making of some of these reports, and that in one particular case the matter was of sufficient importance to be referred to the United States Military Department (Trans. P. 177-178.)

That the defendant bought Liberty bonds during the war with all his means and even invested trust funds in his hands in this manner; that he always made liberal donations to the Red Cross, Y. M. C. A. and other war activities; that he notified

the Alien Enemy Property Custodian of all the property of aliens in his possession, including Boehm's, and that he voluntarily turned over to the United States Intelligence Bureau or the Department of Justice all Boehm's effects, including sealed envelopes, letters, etc.; that this was six months "prior to the raid upon him" and that he was told "Keep them, that is all right." (Trans. P. 178-179.)

That a good part of defendant's time was taken up with questionnaire work of Austrian people, for which he made no charge and that the defendant advised aliens not to claim exemption and told them "that as long as they were making a living they ought to stand by the country that gave them shelter;" that as a result of defendant's efforts in this connection there were only two cases in which the alien enemy did not waive exemption. (Trans. P. 178.) A certain Otto Berg also testified in this connection that he had personal knowledge of two or three aliens or alien enemies whom the defendant advised to go to war after the United States' entry therein. (Trans. P. 181.)

Defendant also testified further in his own behalf that he was never arrested during his residence (twenty-five years) in the United States; that he was a tax-payer, and all that he had was in this country; that he had no thought of disloyalty to the United States; that he never did anything that conflicted with the interest of the United States, and that in reference to the Boehm passport application he testified "I didn't look upon this passport ques-

tion in the first instance that way; in fact never gave it a thought until the thing was all over and too late; but as far as my life here is concerned, I can refer to every community I ever lived in, I have done the best for the uplift of everything. And if I hadn't been above the age limit to call to service, I know I would not have evaded the law. I have always done what I thought I was expected to do, and then some, and if necessary or if the country needed it, would go to the limit, life and property, anything in making personal sacrifices for it." (Trans. P. 179-180.)

## POINTS AND AUTHORITIES.

### I.

Defendant's motion filed prior to the answer, moving a dismissal of the Bill of Complaint on the ground "that the facts alleged therein do not constitute a cause of suit or entitle the plaintiff to the relief therein prayed for," should have been allowed by the trial court; however, this motion was denied and the same was then set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

This motion should have been allowed. First, because Sec. 15 of Act 1906 as it relates to the instant case is unconstitutional and that the instant case is not one of the cases provided for in said act.

United States vs. Cohen Grocery, 255 U. S. Rep. 81-87.

## II.

Defendant's motion filed prior to the answer moving a dismissal of the Bill of Complaint on the ground "That the affidavit of V. W. Tomilson, Naturalization Officer, attached to said Bill of Complaint and upon which affidavit, Lester W. Humphreys, United States District Attorney, instituted this proceeding by the filing of said Bill of Complaint in this court, does not show good cause therefor as required by law but on the contrary, the facts in said affidavit set forth show that there is no legal ground for the institution of this proceedings," should have been allowed by the trial court. However, this motion was denied and the same was then set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

Cohen vs. United States, 38 App. Fed. (D. C.) 123.

U. S. vs. Sharrock, 276 Fed. 30-32.

U. S. vs. Rose, 166 Fed. 999.

U. S. vs. Rockteschell, 208 Fed. 530-125 C. C. A. 532.

U. S. vs. Norsch, 42 Fed. 417-419.

## III.

Defendant's motion filed prior to the answer, moving a dismissal of the Bill of Complaint on the ground "That the cause of suit as alleged in the said bill of complaint has not accrued within five years next preceding the filing of the complaint as required by law and it so appears from the face of the bill of complaint" should have been allowed by the trial court. However, this motion was denied and the



same was then set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

In re McCarran, 29 N. Y. S. 582.

4303 Barnes Federal Code, 26 U. S. Stat. 1099.

3770 Barnes Federal Code, 34 U. S. Stat. 603.

U. S. vs. Norsch, 42 Fed. 417.

U. S. vs. Rose, 166 Fed. 999.

Sec. 1449 Barnes Federal Code, Act Feb. 28th.,  
1839, Chap 36, Sec. 1 and 4.

#### IV.

Defendant's motion filed prior to the answer moving a dismissal of the bill of complaint on the ground "That said bill of complaint was not filed in the court within the statutory period required by law, and it so appears from the face of the bill of complaint" should have been allowed by the trial court. However, this motion was denied and the same was set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

In re McCarran, 29 N. Y. S. 582.

4303 Barnes Federal Code, 26 U. S. Stat. 1099.

3770 Barnes Federal Code, 34 U. S. Stat. 603.

U. S. vs. Norsch, 42 Fed. 417.

U. S. vs. Rose, 166 Fed. 999.

Sec. 1449 Barnes Federal Code, Act of Feb. 28,  
1839, Chap. 36, Sec. 1 and 4.

#### V.

That the motion of defendant filed several months before the trial of the case on its merits for the return of the original papers and letters as well as stenographic and photographic or other copies thereof



seized by the government from the defendant on an admittedly invalid and illegal search warrant in violation of defendant's statutory and constitutional rights should have been allowed in toto and not only as far as the original documents themselves were concerned.

Boyd vs. U. S. 116 U. S. 623.

United States vs. Wong Quong Wong, 94 Fed. 832.

Weeks vs. U. S., 232 U. S. 385.

Gould vs. U. S., 41 Sup. Ct. Rep. 261.

U. S. vs. Friedberg, 233 Fed. 313.

In Re Marx, 255 Fed. 344.

U. S. vs. Lydecker, 275 Fed. 976-980.

U. S. vs. Mounday, 208 Fed. 186.

## VI.

That the original documents seized by the Government from the defendant on an admittedly invalid and illegal search warrant in violation of defendant's statutory and constitutional rights and thereafter upon due and proper motion of the defendant ordered returned to him by the trial court should not again have been ordered produced by the court at the trial of the within cause for use as evidence or otherwise.

U. S. vs. Slusser, 270 Fed. 818.

Silverthorne Lumber Co. vs. U. S. 251 U. S. 386.

U. S. vs. Kraus, 270 Fed. 578-80-81-82.

## VII.

That the admission into evidence on behalf of the plaintiff of the diary and especially the letters of the defendant, which documents were obtained by the government on an admittedly invalid and illegal

search warrant and in violation of the defendant's statutory and constitutional rights, over the objection of the defendant that said documents were seized by the government in violation of his statutory and constitutional rights, was improper and said documents and letters should not have been admitted and should not have been considered as evidence by the court, and that furthermore the government was debarred from using any information thus obtained by its own admittedly illegal act and in violation of statutory and constitutional provisions.

U. S. vs. Kraus, 270 Fed. 578.

U. S. vs. Mounday, 208 Fed. 186.

Silverthorne Lumber Co. vs. U. S., 251 U. S. 385.

Ex. Parte Jackson, 263 Fed. 110.

U. S. vs. Lydecker, 275 Fed. 976-980.

### VIII.

That the admission of the letters of the defendant and all of them over the further objection of the defendant as to their inadmissibility on the ground of their not being competent, revelant or material was improper as no complaint in this connection of any action of the defendant is made in the bill of complaint or the affidavit attached thereto, which affidavit is the basis for the filing of the suit by the District Attorney, and that therefore said letters should not have been considered as evidence or admitted as such over the defendant's proper objections thereto.

U. S. vs. Roetschell, 208 Fed. 530-125 C. C. A. 532.

## IX.

That defendant's action in furnishing his passport to another in 1914 did not constitute cause for cancellation of citizenship.

## X.

Expressions of opinions either for or against any of the participants in the world war in 1914, 1915, or 1916, or criticisms, expressions of opinions, hopes or desires that the United States would not participate in the war prior to its actual entrance therein do not show disloyalty.

In Re Watkins, 269 Fed. 466.

In Re Cluny, 264 Fed. 464.

## XI.

Until the declaration of war by the United States in 1917 there was no opportunity or necessity for a naturalized citizen to make a choice or preference in allegiance.

In Re Watkins, 269 Fed. 466.

In Re Cluny, 264 Fed. 464.

## XII.

When the United States entered into the world war on the side of the Allies and against Germany, there then arose for the first time the opportunity and necessity, if at all, of the defendant to make an unquestioned choice and preference of allegiance and the evidence clearly shows that this was emphatically and unmistakably made by the defendant in favor of the United States.

## XIII.

As a matter of fact and of law the defendant at the time of taking his oath of citizenship owed and

had no allegiance to Germany by reason of his having voluntarily expatriated himself and having given up his rights as a German citizen and therefore could not have had a mental reservation as to his allegiance. (Defendant's Exhibit A. Tran. P. 172.)

#### XIV.

The defendant's letters show they were written with a heavy heart and an anguished soul and mainly for the purpose of comforting his aged parents and suffering relatives.

#### XV.

Although a portion of the facts herein were stipulated, the defendant as well as others testified personally covering most of the facts in the stipulation and much more in addition thereto, especially the explanations and reasons for the defendant's actions herein and the defendant voluntarily testifying and submitting himself for unreserved cross-examinations by the prosecution and the court, enabled the trial court to form its opinion on the main facts involved by personal observation and judgment, which said opinion is therefore entitled to serious consideration by the Appellate Court.

Brandt vs. U. S. 198 Fed. 449-453-117 C. C. A. 208.

U. S. vs. Marshall, 210 Fed. 595-597-127 C. C. A. 231.

#### XVI.

The trial court is the judge of the evidence, its weight and the inferences to be drawn and its findings or decree will not be disturbed on appeal un-

less the inferences were entirely unwarranted by the circumstances.

Brandt vs. U. S. 198 Fed. 449-453. 117 C. C. A. 208.

U. S. vs. Marshall, 210 Fed. 595-597. 127 C. C. A. 231.

Conner vs. Martin, 46 Ind. App. 141-145. 92 N. E. 3.

Fanning vs. Green, 156 Cal. 279-284. 104 Pac. 308.

Bettens vs. Hoover, 12 Cal. App. 313 107 Pac. 329.

Wunder vs. Turner, 120 Minn. 13-15.

## XVII.

Under the new equity rule the reviewing court has the right of trying the questions of fact *de novo*; but the findings below are not to be disturbed unless it clearly appears that the trial court was obviously in error.

American Rotary Valve Co. vs. Moorehead, 226 Fed. 202, 141 C. C. A. 129.

Certiorari denied 239 U. S. 641.

Weld vs. McKay, 218 Fed. 807.

Espenschild vs. Baum., 115 Fed. 793. 53 C. C. A. 368.

## ARGUMENT.

Before taking up this case on its merits, respondent respectfully calls the court's attention to several preliminary motions made prior to the actual trial of the case and renewed in the answer which, had they been allowed as respondent contends they should have been, would have resulted in the dismissal of the complaint.



The Act of June 29, 1906, under which these proceedings are brought, reads as follows:

3764 Barnes Federal Code. 1919. 34 Stat. 601.

Sec. 15. *Cancellation of Certificates.* "It shall be the duty of the United States District Attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured, shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

"If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States

at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

“Whenever any certificates of citizenship shall be set aside or cancelled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

“The provisions of this section apply not only a certificate of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.”

The first paragraph of Section 15 of the above Act as it relates to the instant case is unconstitutional in that it is vague, indefinite and uncertain. It fixes no standard of fraud or unlawful conduct. Each District Attorney may set up a standard of his own.

This statute, neither by express terms nor by implication, gives to the court authority to set aside its judgments after the expiration of the terms in which they were rendered. The first paragraph of Section 15 of the Act is directory only to the District Attorney. It prescribes his duty and then prescribes for service upon and answer of defendant.

The second paragraph of Section 15 is a statutory rule of evidence, with provisions for cancellation upon such evidence.

The third paragraph of Section 15 relates by express language to the provisions of the second paragraph and cannot by a liberal construction relate to the provisions of the first paragraph for the language of the second paragraph, “Whenever any certificate of citizenship shall be set aside or cancelled, *as herein provided*,” etc., refers to the provisions found in the second paragraph “\* \* it shall be sufficient in the proper proceeding to authorize

the cancellation of this certificate of citizenship as fraudulent\* \*”. In no other part of this statute is there express language authorizing cancellation.

The second paragraph of Section 15 was intended by Congress to remedy the then common practice of aliens securing certificates of citizenship and soon thereafter proceeding to some other country where they intended to permanently reside under the protection of the United States.

The arguments and debates in Congress show this abuse was the evil sought to be corrected by this act.

The last paragraph of Section 15 gives the Act retrospective effect.

It is our contention that appropriate provision for the cancellation of certificates of citizenship on the ground urged in this suit must be found in the Act, else the judgment of the court admitting this defendant to citizenship cannot be set aside and vacated.

The order of court admitting an alien to citizenship is a judgment.

Campbell vs. Gordon, 6 Cranch 176, 182.

Spratt vs. Spratt, 4 Pet. 393, 408.

Chas. Greene’s Sons vs. Salas, 31 Fed. 106.

In Re Tinn, 148 Cal. 773 (84 Pac. 152).

“It is settled by the authorities that an order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction.”

Such an order is conclusive:

“An order admitting to citizenship, having the



force and effect of a judgment, is conclusive as to all matters necessarily before the court and involved in the issue."

2 Corpus Juris 1124.

Spratt vs. Spratt, 4 Pet. (U. S.) 393.

U. S. vs. Aakervik, 180 Fed. 137.

*Power of Courts to Reverse or Vacate Judgments.*

Courts generally have jurisdiction to reverse or vacate their own judgments and decrees during the term at which they are rendered. After the term has ended, however, the authority of the courts as to this purpose ceases, *unless extended by statute* or by motion, or by some appropriate procedure taken within the term. U. S. vs. Aakervik, 180 Fed. 137, 23 Cyc. 902.

In the Aakervik case Judge Wolverton held this act to be unconstitutional saying, "It seems clear that the act of legislation is to grant a new trial in a judicial proceeding which had otherwise become final and effective."

This decision, however, has been reversed by the Supreme Court of the United States, in the case of Johannessen vs. United States 225 U. S. 227. In this case the court held that judgments of this class are not conclusive against the public and it is competent for Congress to authorize independent proceedings to set them aside for fraud and it was further held that the retrospective feature of the act to do so is not within the "*ex post facto*" provision of the constitution, Article 1, Section 9. These were the only two points decided in the Johannessen case



We do not challenge the power of Congress to pass a statute which by appropriate proceedings would test the sufficiency of the Order of Naturalization. The point that we make is that the present statute is, first, uncertain and indefinite and, second, it does not by express terms or by implication direct the courts to vacate such judgments on the ground of fraud occurring at the time of the hearing. The only provision is for fraud occurring after the hearing, namely, when one, after having secured the order of citizenship, departs from this country within five years next thereafter. If, therefore, authority to set aside the judgment is not found in this Act, the judgment remains conclusive.

If the Act in question does apply to the instant case, then the respondent respectfully contends that the complaint is insufficient and does not state a cause of suit. The whole "meat" of the complaint is set forth in paragraph four thereof, to-wit: "That the aforesaid oath (of allegiance) so made by the defendant before said Superior Court of the State of Washington for Pacific County, was fraudulent and untrue in this, that the said defendant made said oath with a mental reservation of allegiance to said William II, Emperor of Germany, and to the State of Germany, and that the said allegiance, so reserved by the defendant aforesaid, was and is superior to the allegiance held by the said defendant to the United States of America." Respondent contends that this allegation insofar as it must necessarily rely upon the affidavit attached to the complaint

for its support (*Cohen vs. United States*, 38 App. (D. C.) 123) is a mere conclusion of law and based upon facts which, if true, would allow many possible inferences to be drawn therefrom, none of which would show a mental reservation on the part of the defendant. Story's *Equity Jurisprudence*, Vol I, pg. 263-4 states: "It is rule of equity that fraud is not presumed, but it must be established by proofs. Circumstances of mere suspicion leading to no certain results will not in either of these courts (equity) be deemed a sufficient ground to establish fraud."

In *U. S. vs. Rose*, 166 Fed. 999, a citizenship cancellation case, it is stated: "That averment that the judgment was fraudulently and illegally procured is a mere conclusion and of no avail unless the facts alleged show that the defendant so procured the same."

In a similar case, *U. S. vs. Norsch*, 42 Fed. 417-419, it is stated: "A state of facts must be disclosed by the bill, from which the court can see that the conclusion stated by the pleader to the effect that the judgment was fraudulently procured, are properly drawn."

For the purpose of this motion taking the statements of facts in the affidavit as true, the defendant is charged with having wrongfully and unlawfully procured a false passport for one Hans Boehm, at that time (1914) a German reserve or other officer whose exact official connection is unknown. The affidavit does not allege that the defendant knew of such connection; it is merely descriptive of the

person for whom he procured the passport. The affidavit also at length describes the uses to which Boehm put the false passport and again is silent as to defendant's knowledge of such purpose. The claim of the complaint is, that because the defendant secured such false passport for the said Boehm in 1914 that therefore a legal conclusion or inference or presumption of law from this fact is, that the defendant was disloyal to his adopted country, the United States, and therefore if disloyal in 1914 he must have been disloyal in 1904 at the time he was admitted to citizenship.

The entire value of the affidavit is to be decided by what are the reasonable and probable inferences to be drawn from the facts stated by the affiant. If several conclusions or deductions may be drawn from a fact, then no one of them can be a logical and probable inference that flows from such fact. The conclusion must then rest upon the proof of the facts or be left in doubt and uncertainty. The defendant in this case by his conduct set out in the affidavit certainly made no choice in his allegiance between his native and adopted country, because he may have been actuated in the passport matter by many motives, none of which would indicate that he was disloyal to the United States. The decisive point is whether the inference or conclusion is a natural and probable one.

As was said by the court in another citizenship cancellation case, *United States vs. Rockteschell*,

208 Fed. 530, in referring to the petition or complaint:

“But this general averment involving as it does, possible inferences of facts as well as general conclusions of law is insufficient as a charge of perjured testimony or of other fraud.”

\* \* \* “To be sufficient the petition must, in harmony with the general rule of pleading fraud, point out specifically in what particular respect the representations were false. This the petition has failed to do. Nor do the facts set up in the affidavit necessarily negative the respondents right to admission. Standing alone and unexplained it is true they raise a very substantial doubt of his right; but in the light of other circumstances and details which may have been before the court and which may have illuminated his motive and interest, that doubt may have been readily dissipated. Besides, it is not for a court in a proceeding of this character to review or set aside findings of a court of original jurisdiction, based upon conflicting evidence or upon evidence reasonable susceptible to different influences.”

So the fact of the defendant's actions set forth in the affidavit “may have illuminated his motive and interest” and his actions were “reasonable susceptible to different inferences.”

Therefore the affidavit, which must show good and sufficient cause for the suit, has failed to perform its requisite function and the motion to dismiss the complaint should have been allowed.

Defendant's other motions for dismissal of the complaint before the trial and again renewed in



the answer and urged upon the court after the Government rested its case, were based upon the fact that the complaint showed on its face (and the Government's case at the trial substantiated the fact) that the suit was not brought within the time limited by law.

The following are United States Statutes which have some bearing on the subject. Barnes Federal Code 1149, Act of Feb. 28th, 1893, Chapter 36, Sec. 4, provides:

“No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specifically provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued.”

It is also to be noted that the naturalization act provides that if a person leaves the United States within five years after the certificate is granted, it is to be considered as *prima facie* evidence of fraud.

Respondent contends that the instant proceeding is a forfeiture of a public right or grant, but even if it be not construed a forfeiture, surely it would come under the words of the statute expressed as “or otherwise.”

In *Re McCarran*, 29 N. Y. S. 582-583, in speaking of a citizenship cancellation, the court stated:

“It is contended, however, that the motion, being based upon alleged fraud in obtaining the order which is sought to be set aside, is barred by no limitation; but this contention is founded solely upon certain authorities holding that such



a proceeding does not fall within the limitations prescribed in the case where irregularity or error of fact is assigned. These authorities do not warrant the assumption that no limitation (running from the date when the facts were discovered) may operate upon a motion of this character." \* \* \* "Whatever express statutory limitation may here apply however it is not necessary to determine, for the neglect of the parties to make this motion during the great period which has elapsed is fatal to the application. No explanation is here offered for the negligence of the moving parties in this regard, the affidavit submitted tending to show that the facts constituting the alleged fraud were known to the affiants from the commencement of the period in question."

In a similar way the affidavit attached to the complaint would indicate that these facts were known to the government since 1914. At any rate, no explanation is made in the affidavit or complaint as to the reason for the dilatory action in not filing this suit until nearly seven years later.

In *U. S. vs. Norsch*, 42 Fed. 417-419, the court states:

"The rights of the United States to sue for the cancellation of a certificate or decree of naturalization that has been obtained by fraud is probably co-extensive with the right now accorded to the United States to sue for the cancellation of patents that have been fraudulently procured."

Under the government's theory of this casus, the defendant by his action in 1914 made himself liable to the cancellation of his certificate of citizen-

ship at that time; five years would have therefore expired in 1919, although this suit was not filed until 1921.

It seems singular that the law should throw additional protection around a person's property rights, while denying him full protection in a right far superior—the right of citizenship. The policy of this country is to protect everyone against a dilatory threat of either criminal or civil actions or suits, for statute of limitations are to be found which cover all. In the Naturalization Act itself we find a section prescribing criminal action for misconduct occurring after the passage of the act, but even against this there is a limitation in time in the act itself. Either therefore the words “or otherwise” in the foregoing general statute of limitations in suits by the government applies to this suit or the courts must hold that in this particular class of suit there is absolutely no limitation of time whatsoever upon the government.

Some time before the above suit was started the government made a “raid” on the defendant's home and office, and secured a truck load of papers, letters and private memoranda (Search warrants Trans. p. 40-45). Thereafter and long before the trial of the instant suit the defendant, through proper motion, applied for the return of this property, alleging the search and seizure was illegal and unlawful and in violation of defendant's statutory and constitutional rights. Upon the hearing of this motion the United States District Attorney admit-

ted in open court and the court's order set forth the fact "that the search warrants in question do not comply with statutory and constitutional requirements," (Transcript. P. 48), whereupon the Court ordered returned to the defendant all the original documents but refused to order the return of copies as prayed for in defendant's motion.

Thereafter the government filed a motion for the production at the trial of the identical documents heretofore ordered returned, (Trans. P. 52) upon which motion the court made an order requiring the defendant to produce the identical documents at the trial (Trans. P. 60). At the trial these documents were admitted into evidence by the trial court subject to the objection of the defendant "that the same were incompetent, irrelevant and immaterial and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in violation of the Fourth and Fifth Amendments to the Constitution of the United States." (Trans. P. 171.)

For all practical purposes of this brief the proceedings in connection with the search and seizure feature can be reached under a discussion of the following question: Was it proper for the court to admit into evidence and to consider as such over the proper objections of the defendant, documents, letters, etc., secured by the government under an admittedly illegal and invalid search warrant and in violation of the defendant's statutory and constitutional rights? In this connection the respondent

will even go a step further and contend that not only should the documents themselves (or copies thereof) not have been admitted or considered by the court, but that by reason of its unlawful action in the matter the government was debarred at the trial from using any information received by it from these documents, without at least showing that its information was obtained from independent sources and not "the fruits of its illegal act."

The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated," etc. This expressly creates the rights given and does not confine the same to either criminal or civil cases. That this amendment applies to civil cases is clear when one considers that the greatest of all cases on this subject, that of *Boyd vs. United States*, 116 U. S. 623, was a civil case for the forfeiture of thirty-five cases of glass, and therefore more or less of a quasi-criminal case as the instant case.

The elaborate decision in that case is the basis of all similar cases and in it the court used this language:

"This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws."

In the case of *United States vs. Mounday*, 208 Fed. 186, the court used the following language:

"How, therefore, can the rights of the de-



defendants 'to be secure in their persons, houses, papers and effects' be asserted by and granted to them as the Constitution guarantees, in this Court?"... "As yet, the defendants stand charged with the commission of no criminal offense in this court"... "Shall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done the defendants by the ruthless invasion of their constitutional rights and become a party to the wrongful act by permitting the use of the fruits of such act? Such is not my conception of the sanctity of rights expressly guaranteed by the Constitution to a citizen."

And as was similarly said by Chief Justice White in *Weeks vs. United States*, 232 U. S. 383:

"The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of the law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws."

In a late deportation case, decided in 1920, *Ex parte Jackson*, 253 Fed. 110, it appeared that Jackson was ordered deported upon proof furnished among other things by virtue of papers, etc., seized



in an unlawful raid. The court in this connection said:

“The law and courts no more sanction such evidence than such methods and no more approve of either than the thumbscrew and the rack.”

And in speaking of defendant's constitutional rights in the deportation proceeding stated:

“These (rights) are the fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key and capstone of the Constitution. They are limited to no man, race, or nation, to no time, place or occasion, but belong to man, always, everywhere, and in all circumstances.” . . . “And they must be defended and maintained in the face of every assault by government or otherwise. All judgments based upon their violation must be set aside.”

In the last word from the United States Supreme Court in *Gouled vs. United States* 41 Supreme Court Reporter 261, decided in February, 1921, in speaking of these rights the court said:

“It has been repeatedly decided that these amendments (Fourth and Fifth) should receive a liberal construction, so as to prevent stealthy encroachment upon or a ‘gradual depreciation’ of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.”

In another late case decided in 1921, *United States vs. Kraus*, 270 Fed. 578-80, the court stated:

“Except for the character of the document seized the law in cases of unlawful search and seizure is now well settled. When seized, they must be returned, with them all copies taken while the officers retained their illegal possession. Furthermore, the prosecution may not use at the trial or in its preparation any information obtained from their scrutiny.” \* \* \*

“It is apparent therefore, that not only must the papers be returned, but any copies now in possession of the respondents. A more difficult question arises to prevent any use of the information derived from their possession,”

\* \* \* “The officials made the first unlawful move, and any confusion resulting from it they must undertake to clear up. The order must, therefore, provide that no testimony or other evidence of any transaction recorded in any of the papers seized shall be offered upon the trial unless the respondents can show that they got it independently of their wrongful possession.” \* \* \* “No such transaction may be proved unless respondents show before the master that they have independent proof not derived from information contained in the papers. The expense of that reference will be borne by the prosecution, through whose wrong the difficulty arose.”

See also *United States vs. Lydecker*, 275 Fed. 976-80, where the court stated in a similar case:

“I think that the papers and letters seized and copies, if there are any in existence, should be returned. It does not appear that any testimony was gleaned from them” \* \* \* “But if any testimony is offered at the trial that is

believed by the petitioner to have been obtained from illegally seized papers, the evidence is subject to rejection.”

In the *Silverthorne Lumber Co. vs. United States* 251 U. So 385, referred to by the appellant herein, in which the government had returned to defendant illegally seized papers, etc., and had thereafter by motion been ordered to return them, it appeared however before returning them it had copies made thereof, and at the trial had the originals ordered produced under a subpoena *duces tecum*. The case went to the Supreme Court and in commenting on these facts, Mr. Justice Holmes said:

“The proposition could not be presented more nakedly. It is that although, of course, its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. *Weeks vs. United States*, 232 U. S. 382, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words, 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired

shall not be used before the court, but that it shall not be used at all."

The language then follows as given in the appellant's brief. This then is the sole case relied upon by the government for its use of evidence so unlawfully seized. We maintain that not only does this case not support their contention, but that it is a strong case in support of respondent's position.

The other cases herein cited show in what manner evidence thus obtained may be used, i. e., only when the government actually shows that it had prior knowledge or information on the subject. This is especially true where express objections to the admission of this evidence were made at the trial on the ground of its illegal acquirement by the government. In addition proper motions in this connection also were made prior to the trial. That these objections were properly made and saved is shown by Transcript of Record P. 171, where in the Statement of Evidence the following appears:

"That all of the letters heretofore quoted and being in pages 5-24 of this Statement of Evidence, the same beginning with the letter on page 5 hereof, dated May 31st. 1915, written to one Hoerner, and ending with the letter on page 24 hereof signed H. W. B., were admitted subject to the objection of the defendant; that the same were incompetent, irrelevant and immaterial and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in viola-



tion of the 4th and 5th Amendments to the Constitution of the United States.”

Why the appellant should now for the first time endeavor to raise a technical “dust cloud” in connection with the objection to the admission of these letters and the stipulation in this case, is unknown to respondent, unless as respondent believes the appellant for the first time realizes the fallacy of trying to maintain his former position; i. e., that he had a right to introduce these documents into evidence, especially without endeavoring to show information of the facts contained therein independent of the search warrant discoveries.

In addition to the constitutional objections to the admission of the letters respondent submits that his objection thereto on the ground of their being incompetent, irrelevant and immaterial should have been sustained because as was urged at the trial, no mention of any kind of said letters or of the actions in writing them, etc., was complained of either in the complaint or the affidavit attached thereto, and respondent submits that complaint and the affidavit must contain every fact essential to the plaintiff’s cause of suit and that no evidence should have been admitted to prove any fact not alleged therein; that the only allegations made against defendant were his actions in connection with Boehm, and these letters could in no way be said to have anything to do with said actions or tend to prove or disprove the facts alleged in said affidavit, and that therefore they should not have been admitted or considered.



## AS TO EVIDENCE IN CASE

On the facts in the case the question at issue, as stated by the trial court in its opinion, is: "defendant's attitude of mind in 1904 and whether he obtained his certificate of naturalization illegally by false and fraudulent representations as to his true allegiance" (Trans. P. 113), and in the beginning of its opinion the court states:

"But, as said by Judge Hunt in *Schurman vs. United States*, 264 Fed. 919: 'Courts should be very careful to avoid depriving one of citizenship upon evidence which, while proving lack of allegiance at the time of the investigation, may not by relation establish that there was lack of true faith and allegiance at the time of the issuance of the certificate to the applicant'." Trans. P. 114.)

And in referring to the action of the defendant in this case, Judge Bean further stated:

"It all relates to his acts and statements in private letters and memoranda after the commencement of the war between Germany and England and several months prior to the time the United States became involved therein. It should be interpreted in the light of this fact and not that of subsequent events." (Trans. P. 116.)

As a matter of fact the passport incident happened nearly three years before our entrance into the war and not several months prior thereto; however, the position taken by the trial court that the defendant's actions should be interpreted in the light of the facts as existed at that time, is the only

logical position to assume. Therefore, what were conditions in 1914 and thereafter up to our entrance into the war?

At that time our citizens felt free to openly express their sympathies for or against the different belligerents in the war, and these sympathies were natural and in themselves did not and could not indicate a choice between this country and their native country. The District Attorney has at some length set out the proclamation of the President of the United States, directing the citizens to remain at peace with all the belligerents and to maintain strict and impartial neutrality. And then argues that as the act of the defendant in procuring the passport for Boehm was a breach of the presidential proclamation, such breach at once made the defendant a disloyal citizen. This is a strange doctrine in view of the known facts and cannot be sustained either by a governmental policy or logic, for it will be remembered by the Court that thousands of Americans—good loyal Americans—in 1914-1915 and 1916 left the United States and went to Canada and immediately enrolled themselves in the Canadian armies, then being raised for the purpose of combat in the war, thereby forswearing their allegiance to the United States, and that later the United States Congress by a special act re-patriated these soldiers and took them into our armies. We challenge the government to proclaim that these soldiers were disloyal to the United States.

During the same period most everyone was pro-something or other; those with different sympathies were openly celebrating the victories of their favorites; foreign consuls were openly registering their nationals for service; English and German war bonds were openly offered for sale and sold throughout the United States, and everyone knew that the proceeds of the sale of these bonds were to be used for war purposes. Good American citizens not only sold these bonds but bought them. This country sold ammunition to who cared to purchase; Red Cross bazaars were held by all the war participants, and even Senators and Congressmen in the Congress of the United States were taking sides and criticizing this country for either doing or not doing certain things. None of these acts were in strict compliance with the presidential proclamations, but there is no case on record of any of the actors having been brought to trial in any court to defend their citizenship.

Even lately good and loyal American citizens and ex-soldiers of the late war enlisted under the flag of Spain for the war now being waged between Spain and Morroco. These men are not disloyal to the United States in doing this for the United States is at peace with both Spain and Morroco, and therefore while they may be making a preference of Spain over Morroco, there can be no test as to their choice of loyalty to the United States.

So it was in 1914 and similar instances could be presented *ad infinitum*, but these have been cited

in order that the Court may look at the action of the defendant in the light of the events of 1914. Not thru the darker glasses of later events. Let us presume for the sake of argument (as was possible, although perhaps not probable in 1914-1915) that events had so shaped themselves that the United States had joined on the side of Germany instead of the Allies. Would the government then have endeavored to have cancelled defendant's citizenship for his actions herein?

Keeping in view the events of those turbulent days, let us consider the defendant's action at this time only from the government's standpoint. We have first, that he assisted one Boehm to his passport and enabled Boehm to go to Germany to join the military service. The government alleges no particular motive for the defendant's action in this respect, altho the evidence was that the defendant had done so in order to have his parents assisted. It appears from the evidence that from the first dollar the defendant ever earned, he started to support his parents and at the time of the outbreak of the World War in 1914, he was their sole support, and by reason of war his remittances did not reach his people, and he knew they were suffering and in need and depending upon him for support, and that it drove the defendant nearly crazy to think that his old father in his advanced age of life had to endure those hardships and that the defendant could not go, on account of his family here. So when Boehm offered that he would go, he let him have his passport (Trans. P. 174), and further that



the thought of the consequences of his action never occurred to him and that his heart was with the place where his cradle stood and with his folks, and that he felt grievously sorry, and that was the main reason, not to help Boehm (Trans. P. 180). In reference to the letters written by defendant, the testimony shows that the defendant's family wrote him, that any ordinary letter deploring the war, was hardly ever delivered, and that was the reason he resorted to almost any means to get word to his people (Trans. P. 175).

The letters themselves show that they were written with a heavy heart and were mainly to bring a little sunshine, hope and consolation into the dark and weary hearts of his people. This can be found in almost each of the letters; take for instance the letter to his parents dated February 18th, 1916: (Trans. P. 151.)

“Dear Father and Mother:

“I have just received your dear letter and also that of dear sister-in-law, and notice with great sorrow that you were visited with so much sickness this year. It seems I would not care to live any more if you were taken from us. Father, pray that you remain well so that I may see you once more, only once, just once more. God will not take you from us, Father, so don't lose courage, and pray for me that I may stay well, in order to work so that I may give you comfort at least financially until this unhappy war is over. Take good care of yourself, Father, and too of Mother, for she too I want to see once more in this life, and also re-



quest of Mother that she pray for me, so I may get along well and be able to do for you much, much, very much yet. Everytime I take something in my hand which was given to me as a souvenir, I think of her. Tell her to take good care of herself so we can all see another once more. I have instructed the German Bank to pay you beginning with April \$100 per month until the war is over, and of this money I wish for you to keep Mk 50, to give Mk to sister-in-law, and give Mk 20 to Kaspar every month. Poor Kaspar writes that he was sick and I feel very sorry that everything seem to go wrong, but hope with God's grace that everything will be better again. Never refuse the poor or hungry a piece of bread and God the Almighty will never forget us, even though sometimes things don't look the best. The war will and cannot last long anymore because this butchery is frightful. It paralyzes my hand if I just think about it. Father, if it was necessary I would come out to help you at home and to take care of you until the war is over, for here things may get along without me, but if I can do more for you here, I had better stay here. Father, you have cared for us when we were small and helpless, you have worked day and night when we needed you, and now my dear Father I am ready to give my all to make the evening of your life as pleasant as possible. I am awfully sorry for Mother because she had to suffer so much, but God will spare us for her another joyful meeting. And this prayer goes heavenwards every day, with the prayer that nothing may happen to Donat and that he will again return happily.

"Business here is very bad and I am working almost day and night to keep above water, but I never lack optimism, and as long as a person has that, things go alright. Maybe we will make something in our mines this year and we have decided to get them in operation in the near future, since the price of asbestos has gone up.

"And now, dear Father, I shall close for this time, and in the hope that this will find you, Mother, sister-in-law and children and Kaspar and family in best of health, and that the horrible war will soon come to an end, I remain as ever

"Your grateful son."

Other excerpts of letters follow: May 31st, 1915 (Trans. P. 132).

"It is horrible to think about it and the outcome makes one shudder." \* \* \* "One can only do one thing and that is to leave all to God Almighty." \* \* \* "Has Donat (defendant's brother) been already drafted with wife and 5 small children at home?"

Letter dated June 3rd, 1915, (Trans. P. 135):

"Neither have I heard from Father for considerable time, and as you imagine he is worried very much."

Letter of same date (Trans. P. 136):

"Only do not lose courage and everything will be alright again. It is indeed horrible about this disastrous war, and I hope it will soon be over." \* \* \* "I have not heard from Father for some time and neither from my brothers. Donat (defendant's brother) was

already drafted last December, and will no doubt be for some time on the firing line."

Letter dated June 5th, 1915 (Trans. P. 138):

"Yes, dear Aunt, it is horrible about this war, and the end not yet in sight." \* \* \*  
 "My younger brother perhaps has already been drafted, since he was last fall already examined and found able. With 4 or 5 children on his hands and a sick wife, this is to be regretted."  
 \* \* \* "How everything will come out, God only knows."

Letter to parents dated July 26th, 1915, (Trans. P. 140):

"I learn with great sorrow that Donat had to move to the front." \* \* \* "I am astonished that you did not get any of my letters. I have written you often. Naturally my letters are not eventless and contents may not suit. It is shuddering if one takes into consideration the many human lives which this war has already claimed." \* \* \* "How long this horrible war will last yet is perhaps better known to you than to us." \* \* \* "And now, dear parents, I hope this will reach you and that all will come out alright."

Letter to his Father dated November 26th, 1915, (Trans. P. 143):

"I regret very much to know Donat is still at the front." \* \* \* "I can well imagine how everything goes with you, with the head of the family still at the front, and with the many children and Donat's sick wife." \* \* \*  
 "It is immensely sad to think of the misery that has come over Germany and other countries

with an end not yet in sight.” \* \* \* “The letter of my sister-in-law was so touching, and I hope that the prayer of the little ones will be heard. I hope, dear Father, that in spite of your 70 years you will live to see the end of the war and the return of Donat, as well as a reunion of us all. Take good care of yourself so that you will always stay well. I will see that with God’s help my allowance will punctually come into your hands.”

Letter to his brother dated November 25th, 1915,  
(Trans. P. 145):

“Yes, it is sad to think that Donat with his big family at home has to suffer all possible hardships in the enemy’s land. But I hope that with God’s help he will again return.”

Letter to his brother dated January 20th, 1916,  
(Trans. P. 149):

“I also received a letter from my sister-in-law, Donat’s wife, and I am immensely sorry  
.. to read of her plight between the lines. It must be horrible to know that he is now in the bloodiest angle of the whole war, where, as I consider it, it is almost a miracle to return alive.”

Letter to his sister-in-law dated February 18th, 1916, (Trans. P. 153):

“I have just received your letter and also the letter of Father and learn to my great sorrow that you have all been visited by sickness.  
.. It pains me intensely that in spite of all other misery you weren’t spared this visitation, but trust to the divine providence of our Lord and he will make everything right again. He never forgets us if we do not lose faith in Him.”



Letter to his brother dated May 8th, 1916.  
(Trans. P. 156):

“One’s blood stagnates, reading of the horrors of the war, and I cannot understand how the Almighty God allows that so many human lives daily, yes, hourly, are permitted to be butchered. I pray every day and at every opportunity that this terrible and unhappy war would cease.” \* \* \* “Pray for me so I may remain well and be able to help you, and I am willing to sacrifice everything to contribute my mite in this dreariest time and hour in order to alleviate the misery of the unfortunate and suffering.”

And so in each letter some such thoughts are expressed and even in the letter to Hoerner, his friend and banker, who was making additional remittances to his parents, he states (Trans. P. 67):

“Reading the news as they come from all sides, I am overcome with a feeling of sadness.”

In commenting on the passport matter and these letter, the trial court stated:

“But there is no evidence that he knew the passport was to be used, or was, in fact, used for any other purpose, and his action in reference thereto is not sufficient to show a fraudulent reservation of fidelity to Germany at the time of his admission to citizenship ten years before. The same may be said of his private letters to members of his family in Germany criticizing the policy of the United States, expressing love for his native country and a desire for her success. They were all made some months before the United States was at war



and at a time when his native country was hard pressed by her enemies. It is common knowledge that during that time many naturalized citizens born in one or the other of the belligerent countries were in sympathy with the land of their birth and anxious for her success, and not only publicly so expressed themselves, but in other substantial ways aided and assisted her, without their loyalty to their adopted country being then or thereafter called in question." (Trans. P. 116).

There are no recorded cases which have been brought into court solely on actions occurring prior to the United States' entry into the war, as commented upon by Judge Bean in his opinion:

"I have not been referred to a case in which a certificate has been cancelled and set aside upon such proof nor have I been able to find one." (Trans. P. 116).

There are, however, one or two cases which may have a bearing on actions of persons, prior to our entrance into the war, as the case of *In re Watkiss*, 269 Fed. 466, which was a petition for citizenship by Watkiss, a British subject, who after filing his declaration of intention of becoming a citizen of the United States, endeavored on two occasions before the United States' entry into the war to enlist in the British forces. The government contended that this forfeited his rights under his declaration of intention. The Court held:

"Neither of these efforts were successful and the petitioner did not, in connection with either of them, take any oath of allegiance, nor

register or otherwise submit himself for compulsory service—his act must be held to be that of a volunteer, which neither in fact or in law was a recognition of the authority of the British government, or an act of allegiance thereto. This being true, I find nothing in the conduct of the petitioner which could be said to be contrary to the Constitution of the United States or other than well disposed to the good order and happiness of the same. \* \* \* The acts of Watkiss were merely voluntary acts of a person who felt the call of a righteous cause, and desired to do his part in it, with no attorning to or recognition of the authority of the British government over him.”

A somewhat similar case was *In re Cluny*, 269 Fed. 464. In this case a German alien filed his declaration of intention prior to the summer of 1914. After the outbreak of the European war in the fall of 1914, Cluny registered for military service with the German consul at Galveston. Among other things the government contended that this registration invalidated the declaration of intention. The court on this point held:

“I do not agree, however, with the contention of the government that this action of the applicant invalidated his declaration of intention. As before stated the statute does not in terms provide for its invalidation upon facts of the kind in question and the record wholly fails to show any fraud upon the part of the applicant at the time of making it that would invalidate it. In view therefore of the fact that that at the time of his registration the United

States was not at war with Germany (and applicant's record during the war) the petition is dismissed without prejudice."

As a matter of fact there was no opportunity or necessity for a naturalized citizen to make a choice of allegiance or give up his sympathies for either of the belligerents until our country itself entered into the war. Let us consider the defendant's position when that time came and what his answer was when he was put to the test. With aged and suffering parents in Germany, starving relatives, and brothers in the Germany army, did he simply keep quiet, which under the circumstances would perhaps have been all that was expected of him, or did he take any steps to show his love and loyalty for his adopted country? The evidence shows without even any attempt at contradiction that the defendant answered his country's call as was expected of a loyal citizen. It shows that because of his connection as former attorney for one of the belligerents, people would come to him in connection with various things and "whenever anything didn't look right" he reported it to the District Attorney; that after we entered the war he did not even try to write his people or send "them a 5-cent piece much as it broke my heart:" that among his reports to the United States Attorney there was one particular case of a man named Gorman who offered his service to the defendant to do anything that might be needed in behalf of one of the central powers, and the United States Attorney's office records bear out the facts of this

report and the facts show that this particular matter was referred to the Military Department. The defendant testified to three "plainly recollected" reports of a similar nature, none of which was denied by the government (Trans. P. 177).

The statement of evidence further shows the undisputed facts that the defendant bought Liberty Bonds with all the means he had and even invested certain trust funds in his control in these bonds; that he contributed liberally to all the war charities at all times; that he notified the Alien Property Custodian of all property belonging to alien enemies within his knowledge, even including property, such as sealed envelopes and other documents, entrusted to him by Boehm prior to Boehm's departure for Germany in 1914, and that he turned this particular property voluntarily and of his own volition over to the United States Military Intelligence Bureau of the Department of Justice (Trans. P. 178).

The undisputed evidence shows that a great deal of defendant's time was being taken up assisting in filling out questionnaires for aliens and alien enemies, for which he made no charge, and that in these cases he advised the aliens to waive exemption and to "stand by the country that gave them shelter," and that a result of the defendant's efforts along these lines there were only two cases in which the aliens refused to waive exemption. A disinterested witness also testified of several cases in his own knowledge where the defendant had advised the aliens and alien enemies to go to war on behalf of the United States (Trans. P. 179 and 181).



The evidence further showed that the defendant had never been arrested, was a tax payer and that everything that he had was in this country; that he was a law abiding citizen, and that in answer to the question as to what he would do for the United States if the country needed it, he stated he would "go to the limit, life and property." (Trans. P. 180.)

These things done by the defendant were his answer to his test of allegiance. When the United States needed his support, he was not only passively loyal, but actively so. That he was always loyal to the United States is further illustrated in one of the letters introduced by the government, written by the defendant to this very man Boehm in July, 1916, in which the defendant stated, in referring to Germany and the war and defendant's actions in trying to keep the United States out of war, when he said: "I suppose they (his actions) have a bearing upon the relations had in the past with the country across the water, second dearly loved by us all." (Trans. P. 164.)

If Germany was the country "second dearly loved" surely his loyalty and allegiance to the United States had never been usurped. That this is a fact and also as showing that statements derogatory to the United States made in his letters were made mainly for the purposes heretofore mentioned and were not his true feelings, is further borne out by the undisputed fact that the defendant had the habit of keeping an exact diary during all these years in which he had a daily expense account and



“wrote down occurrences and his feelings and thoughts,” (Trans. P. 174) and that he actually did write down “occurrences and his feelings and thoughts” is shown by the diary entries of October, 1914, when he set forth at some length his passport dealings with Boehm, which are the main basis of this suit. That the government seized these diaries and a truck-load of other of the defendant’s letters and private memoranda and closely examined them, is not disputed and yet neither in the diaries or in the other mass of documents was the government able to find a single thought, action or utterance, derogatory to the United States, either before, during or after the war. If there had been it would have been used against him. In fact, as the trial court in his opinion remarked:

..        “There is no evidence of a single act, statement or conduct indicating allegiance to or sympathy with Germany after the entry of the United States into the war, but all the evidence is to the contrary.” (Trans. P. 116.)

## AS TO APPELLANT’S CITATIONS

Respondent believes that the cases cited by the government herein are not in point as in none of them were the actions based upon deeds or speech occurring solely prior to the entry of the United States into the war, and if this were a criminal trial none of the evidence tending to show disloyalty or otherwise occurring prior to our entrance into the war would even be admissible.

Kammon vs. United States. 259 Fed 192, 170  
C. C. A. 276.

Wolf vs. United States, 259 Fed. 388, 170  
C. C. A. 364.

The value of appellant's cases therefore lose considerable of their weight which they might otherwise have had. In the case of United States vs. Wusterbath, 249 Fed. 908, cited by appellant, the Court's opinion shows that:

“\* \* \* it thus appears, without contradiction that the respondent, although a citizen of this country, on three separate occasions (several months having intervened between them), since the outbreak of the war with Germany, gave vent to expressions which clearly indicate that at this time he bears an allegiance to the country of his origin, superior to that which he recognizes to this country” and also that Wusterbath “did not attempt to explain or deny; his attitude was rather one of defiance.”

All the facts in this case proved beyond any doubt that Wusterbath was disloyal to the United States after it had entered the war in 1917 and that he at that time had made a deliberate choice between his native country and his adopted country.

In the case of United States vs. Herberger, 272 Fed. 278, in considering the defendant's case, the court stated:

“The plaintiff relies upon defendant's conduct and statements during the war to establish defendant's want of good faith in the alle-

gations of his petition for naturalization and oath of allegiance."

And in commenting on defendant's conduct as shown in letters written after our entry into the war even stated:

"By itself, defendant's criticism of the 'slam bang' methods of America was not, essentially, disloyal. There are, no doubt, honest, loyal persons of reserved and phlegmatic temperments who consider persons who find relief for their exuberance in noisy demonstrations as hysterical, and who consider an affected super-heated patriotism as the 'last refuge of the scoundrel'."

The case of United States vs. Darmer, 249 Fed. 989, was brought because of defendant's action "during the Second Liberty Loan drive on or about October 17th, 1917."

The case of United States vs. Kraemer, 262 Fed. 395, was for disloyal statements and actions on May 25th and 31st, 1917, after our entrance into the war, and the defendant in that case introduced no testimony whatsoever.

The only other case on this point cited by the government is that of Schurmann vs. United States, 264 Fed. 917, and Judge Hunt of this Circuit Court of Appeals in his opinion stated:

"In behalf of the United States there was abundant evidence that, before and after the declaration of war between the United States and Germany, Schurmann \* \* \* indicated beyond any possible doubt that his feelings

were entirely on the side of Germany against the United States."

And in the same case the court states:

"But it was in the crucial times of 1917 that the respondent failed in the fundamental obligations to his oath of true faith and allegiance in 1904. Not only did he conduct himself to May and June, 1917, as already indicated, but after the war was declared between the United States and Germany," upon being asked if he would defend the United States stated: "I have sworn allegiance to your (United States) flag or country; but I am going to tell you this much: That I didn't swear away my birth-right. \* \* \* And this is the crisis where every German, whether he is a Socialist or not, this is the time that it is up to him to defend the fatherland."

This concludes the cases cited by the appellant, and we respectfully submit that none of them are based upon facts similar to the instant case. In all of them there apparently is no question of the defendant's disloyalty after our entry into the war and in that particular the Woerndle case is not only different but on the contrary, not only is there no evidence of his disloyalty after this time, but the evidence is all to the contrary, showing active and positive evidence of his complete loyalty and allegiance to the United States.

It is a well settled rule of equity "that fraud is not to be presumed, but it must be established by proofs. Circumstances of mere suspicion leading to no certain results will not in equity be deemed a



sufficient ground to establish fraud.” (Story’s Equity Jurisprudence, Vol. I., P. 263-4). And, as is said in *United States vs. Simon*, 170 Fed. 680-682, “so far as the United States relies upon fraud it is bound to prove the fraud. This might have been inferred sufficiently from admitted facts.”

\* \* \* “As the burden of proof rests upon the government, however, this inference is not cogent enough to warrant this court in finding that he (Simon) obtained his naturalization by fraud.”

And as to the strength of the proof required, we beg to refer to *United States vs. Albertini*, 206 Fed. 133-134, where it is held:

“There is evidence tending to prove the allegations in reference to defendant’s anarchism, but under the circumstances it was not the clear, strong, convincing proof necessary to the cancellation of a public grant, to which naturalization is analagous.”

We also call the Court’s attention to the much stronger language of the court in *United States vs. Sharrock*, decided November 5th, 1921, and reported in 276 Fed. 30-32. Quoting the Court in said case:

“In no case of like circumstances, much less in one of the character of the present suit, will a court of equity be satisfied that justice . . . be done by a decree in accordance with the prayer of the bill. To deprive a man of his priceless possession of an inestimable right to American citizenship, there must be full proof. Nothing will warrant cancellation of his evidence, that in quantity and quality inspires con-



fidence and produces conviction of the truth of the charge, virtually beyond reasonable doubt."

Additional strong proof that the respondent herein had no preference of allegiance to Germany over that to the United States is borne out by the undisputed testimony of the defendant that "in order to get away and avoid military duty (in Germany at the time of his emigration to the United States) he applied for and was given a certificate renouncing (his) German citizenship and releasing him from liability for military service." (Trans. P. 172.) And it is further undisputed "that said certificate deprived him of any vestige of German citizenship" (Trans. P. 172). And a copy of the original certificate of expatriation and forfeiture of any and all his rights as a German citizen was admitted without objection into the evidence. (Defendant's Exhibit A.) Not only does this show the defendant had even then (1897) officially and formally expatriated himself from Germany and renounced his citizenship thereof, but it tends to prove that he owed no allegiance to Germany at the time of his oath of allegiance to the United States and therefore, as a matter of fact and of law could not have taken a false oath of allegiance with a mental reservation therein in favor of Germany or its rulers.

## PRESUMPTIONS IN FAVOR OF TRIAL COURT

This brings the discussion down to the question of the presumptions in favor of the decision of the

lower court and what weight or consideration is to be given thereto by this court. Counsel for the government states in his brief:

“The passport fraud and the letters were stipulated. The Court is not asked here to review a finding made on conflicting testimony where the trial judge was aided by personal observation of the witnesses.” (Appellant’s Brief, P. 18.) Also: “The facts here discussed are admitted. Most of them are recited in the stipulation of facts and the others for the greater part are Woerndle’s admissions on the witness stand.” (Appellant’s Brief, P. 64.)

If the facts are admitted then the fact of Woerndle’s explanation for his actions is one of the admitted facts and under this explanation the government can find nothing with which to substantiate its allegations of fraud and mental reservation, and this being the fact the complaint would fall by itself.

As to the appellant’s statement to the effect that the facts were mostly stipulated, this is only a statement liable to be misinterpreted by this court without additional explanation. It is true that a great many of the facts were stipulated, but in addition the defendant and his witness testified orally and personally before the trial court and in their testimony covered each and every one of the stipulated facts and a great many others, and in doing this and in explaining his actions herein, the motives and reasons therefore, etc., the defendant voluntarily subjected himself to unlimited cross examination by the government and the court, and it is from

this testimony adduced on the witness stand, direct and by cross examination, which enabled the trial court to have the advantage of seeing and hearing the witnesses and the opportunity to observe their actions and demeanor and to assist in forming an opinion as to their credibility and trustworthiness. This was especially true in this case because of the necessity of drawing inferences from facts, which without these aids might otherwise perhaps have been subject to different, although improbable and unreasonable inferences. The trial judge performed his duty conscientiously in this respect (for as shown from his opinion he not only examined the cases cited by the plaintiff in its behalf, but he also endeavored to find other cases which might have substantiated that view), and in his decision he makes statements as to what the facts in the case really are and what additional inferences or conclusions, if any, are to be drawn therefrom (Trans. P. 113).

How different the facts of the trial in this case are from that cited by appellant, to-wit: Booth-Kelly Lumber Co. vs. United States, 203 Fed. 423-429, 121 C. C. A. 533, where this Court stated the facts to be as follows:

“The findings in the Court below were made upon evidence which had been taken before an examiner, and not in open court, and they are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witnesses.”

And in the same case in 237 U. S. 481, the Court said:

“The issue is purely one of fact upon matters with regard to which the Circuit Court seems to have been prevented from coming to the same conclusion as the Circuit Court of Appeals rather by presumption in favor of the patents than by its disbelief in the testimony of the defense.”

The conditions in the Booth-Kelly case and the instant case are therefore entirely unlike; in one the testimony was taken before the trial court, in the other before an examiner, and in addition the change in opinion was mostly caused as said by the Supreme Court “rather by the presumption in favor of the patents than by its disbelief in the testimony of the defense.”

The same facts are true of another case cited by appellant, to-wit: *The Santa Rita*, 176 Fed. 890-893, which was a decision by this Court and Judge Hunt clearly shows in the opinion of the Court that the testimony in question was not oral, and that therefore the trial court did not have the advantages which it had in the *Woerndle* case. In the *Santa Rita* case Judge Hunt states:

“In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libellant’s principal witnesses, who gave direct evidence thereon, testified by deposition. Upon this matter, therefore, the trial judge had not the advantage of seeing and hearing the witnesses.



His position, to arrive at a true result, was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of the finding, or the written testimony relates to matters as to which the trial judge is better able to reach a satisfactory conclusion than the appellate court, the findings will be adhered to, does not apply with the same force."

In the Woerndle case, therefore, it seems that insofar as "the oral testimony was evidently the basis of the finding" or "the written testimony relates to matters as to which the trial judge was better able to reach a satisfactory conclusion" that under these controlling circumstances it should not be made an exception to the general rule, but that the usual presumptions of the trial court's decision should be indulged in.

A very interesting case in this connection, in which the Booth-Kelly case, *supra*, and the Santa Rita case, *supra*, were mentioned by another Federal Appellate Court is that of the United States vs. Marshall, 210 Fed. 595, 127 C. C. A. 231. This was a proceeding by the government to cancel a patent alleged to have been obtained by fraud. On appeal the Circuit Court stated:

"To secure a reversal upon such a basis as that just mentioned the appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong. There must, under the holdings of this court have been 'obvious error' of law or a 'serious mistake' in dealing with the facts." \* \* \* "The error must be clear and palpable." \* \* \*



“The conclusion of the trial court is ‘presumptively right’.” \* \* \* “Some distinction relieving from this rule is claimed in the present case because the testimony was not taken before the judge but before the examiner, and it is said under such circumstances, this court is in as favorable a situation to deal with the matter as was the court below. *U. S. vs. Booth-Kelly Lumber Co.*, 203 Fed. 423, 121 C. C. A. 533, from the Ninth Circuit, is cited to this point. But the question is not so much one of situation to decide as of where the law places primary determination of questions of fact. While no doubt the circumstances that the district judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusion—a consideration mentioned by this Court in *Coder vs. McPherson*, 152 Fed. 951—and by the Circuit Court of Appeals for the Ninth Circuit in *The Santa Rita*, 176 Fed. 890. the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition, or upon examiner’s report, does not destroy the presumption. Such still exists in favor of his conclusion. To hold otherwise would in effect be to make this the court of first instance. The District Court is not in such matters a mere conduit. It, not this court, is the trial court. Our functions are simply to guard against manifest error on its part, and this is true whether such arises upon hearing witnesses or upon reading a record. Starting with this presumption in favor of the decision of fact below, is there apparent error in the court’s determination of either of the matters mentioned? We believe not.”

To the same effect was the decision of this Ninth Circuit Court of Appeals in *United States vs. Rockteschell*, 208 Fed. 530, 125 C. C. A. 432, and heretofore cited, where the court held:

“Besides, it is not for a court in a proceeding of this character (cancellation of certificate of citizenship) to review or set aside findings of a court of original jurisdiction, based upon conflicting evidence, or upon evidence reasonably susceptible to different inferences.”

\* \* \* “The correctness of a finding of fact, so long as the same is within the bounds of reason, involves no question of law, and cannot be reviewed or disturbed.”

Applying this reasoning to the *Woerndle* case, the only issue was one of fact, to-wit: Did *Woerndle* hold a mental reservation as to his allegiance at the time of taking his oath of citizenship in 1904? The trial court has found as a matter of fact that he did not.

That this fact, as well as other facts were set forth in the decision and opinion of the trial court, rather than in a formal “Finding of Facts” should make no considerable difference. The citation of the appellant to the case of *Hendryx vs. Perkins*, 123 Fed. 268-270, is not in point on the question of the distinction, if any, between a decision or opinion of the court and formal findings. The appellant gives this case as authority for the statement that “an opinion of a trial judge in an equity case is not a finding and statement of facts.” (*Appellant’s Brief*, P. 18.)

The case cited while is contains the above statement, at once explains and qualifies the same as follows:

“The opinion regarding such question is only of the very able trial judge who gave it upon an abstract proposition as distinguished from an adjudication upon a point actually in issue.” . . . “In the present case, however, as fully explained in our prior opinions, the decree of the Circuit Court appealed from necessarily implied a finding of facts.”

So the decree appealed from here is necessarily from the finding of facts and the inferences drawn therefrom as stated in the trial court's decision.

Neither does the so-called new equity rule change the procedure and presumptions due the trial court in an equitable appeal, as said in *American Rotary Valve Co. vs. Moorehead*, 226 Fed. 202, 141 C. C. A. 129, by the Seventh Circuit Court of Appeals:

“Under the old rules, the finding of the trial court were entitled to be treated as very persuasive, and such findings were not disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. We conceive that the new rules have made no change in those respects. Cases are ordinarily to be heard in open court by the trial judge, while formerly they were ordinarily referred to a master. But under either set of rules, if the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration, is the opportunity of the trial judge to estimate the credi-

bility of the witnesses by their appearance and demeanor on the stand." Citing *Espenschild vs. Baum*, 115 Fed. 793. A writ of certiorari was thereafter denied in this case, 239 U. S. 641.

And in the case of *Espenschild vs. Baum* *supra*, referred to, it was held:

"The assignment of errors presents the sole question whether the decree should be reversed on the evidence. A careful consideration of the evidence in the record convinces us that the decree was right. But if the conflicts in the evidence were greater than we find them, a reversal would not be justified, since the court at the trial had the opportunity (which we have not) of judging of the credibility of the witnesses by their appearance and demeanor on the stand. Under such circumstances, a very clear and palpable error in the facts must be shown on appeal."

Even where there is no conflict of evidence the presumption is in favor of the trial court's opinion. *Weld vs. McKay*, 218 Fed. 807, Seventh Circuit Court of Appeals, where it was said:

"The facts found by the chancellor will be presumed correct, unless the record shows an egregious blunder, or an error in the application of the law, resulting in manifest injustice. The pertinent issue of fact was determined solely upon the testimony of *McKay* and counsel urges, that the foregoing rule applies only where there is a conflict in the evidence. This is not so. The evidentiary facts may all be made known from the mouth of a single witness, and



yet the ultimate fact as determined by the chancellor is just as persuasive as if the evidentiary facts had come from many witnesses."

See also *Wunder vs. Turner*, 120 Minn. 13-15, where it is also held that "The rule applies to inferences from undisputed facts and to documentary evidence."

Considering this case therefore from all angles, the constitutional and statutory objections to the complaint itself; the introductions and consideration of testimony admittedly secured by the government in violation of the respondent's constitutional and statutory rights; the fact that all the respondent's acts complained of occurred long before the entrance of the United States into the world war; the further fact that these actions were not intrinsically malicious in intent, but were caused by what may perhaps be termed "mitigating circumstances"; the fact of respondent's active and unmistakable loyalty to the United States after its entrance into the war; the fact of respondent's voluntary expatriation and of renunciation of his German citizenship and the fact of the trial court's finding in his favor; and the further fact that the respondent and his family, who are prominent in social and business life of their community have suffered untold pain and humiliation through the wide publicity given to his actions in this case, we respectfully submit that equity and justice will not demand any further punishment through the loss of the respondent's citizenship herein by a reversal of the trial court by this Circuit Court of Appeals,



and that as a matter of law and fact the decree of the trial court should be affirmed.

If respondent's brief herein seems rather lengthy, counsel asks the court's indulgence thereof, as the responsibility resting upon him in the case of protecting the respondent's inestimable privilege of citizenship warranted an exhaustive review of the matter.

Respectfully submitted,

C. T. HAAS,  
Attorney for Respondent.



No. 3932

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IN THE

**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

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UNITED STATES OF AMERICA,  
Plaintiff, Appellant,  
vs.

JOSEPH WOERNDLE,  
Defendant, Respondent.

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**Reply Brief of Appellant**

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Upon Appeal from the United States District Court  
for the District of Oregon.

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JOHN S. COKE,  
United States Attorney for Oregon,  
For Appellant.

C. T. HAAS,  
Attorney for Respondent.

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## STATEMENT

Defendant apparently relies in his brief upon the following propositions:

1. That the complaint does not state facts sufficient to constitute a cause of suit.

2. That the suit is barred by the Statute of Limitations.

3. That the affidavit attached to complaint does not show a sufficient cause to authorize the commencement of the suit.

4. The refusal of the trial court to order a return to defendant of the photographic copies of documents found at defendant's residence and office.

5. That Section 15 of the Act of June 29, 1906, is unconstitutional, because indefinite and uncertain.

6. Defendant complains of the fact that the letters obtained under a void search warrant were received in evidence.

7. That proceedings to cancel the certificate of citizenship can only be heard in the court granting it, and within the term.

8. That after the United States declared war

against Germany, defendant demonstrated his loyalty to the United States by the purchase of Liberty bonds, and in other acts showing his alleged loyalty.

## ARGUMENT

Before defendant made answer to the complaint he moved the court to dismiss the complaint on the ground that it failed to state a cause of suit; that the cause of suit was barred by the five-year Statute of Limitations, and that the affidavit attached to complaint was insufficient.

These propositions were again raised in the answer filed by the defendant, and at the close of the taking of testimony the defendant again renewed his motion. In each of these proceedings the trial judge denied these motions. We do not deem that the matters raised by these motions require serious discussion or consideration.

The complaint alleges that Joseph Woerndle obtained his certificate of naturalization through fraud and false testimony, upon which the Court relied in granting him a certificate of citizenship. It is stated in complaint that defendant, in order to procure this certificate, declared upon oath in open court that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign prince, poten-

state, state and sovereignty, and particularly to the Emperor of Germany, while in truth and in fact he did not renounce or abjure allegiance to the German Empire; that for the purpose of deceiving and misleading the Court, he kept and retained allegiance to the Emperor of Germany.

The complaint does not solely rest, as claimed by defendant, upon the fraudulent acts of defendant with respect to the passport secured for and delivered to Hans W. Boehm, but it is based upon the alleged fraud and false testimony given by the defendant in his naturalization proceedings, the evidence of which is shown in his various acts and written statements, commencing with the procurement of the Boehm passport in 1914 and extending through the years 1914, 1915 and 1916.

The five-year Statute of Limitations, relied upon by defendant, relates to criminal proceedings, penalties and forfeitures. There is no five-year Statute of Limitations governing proceedings in the nature of this suit.

Johannessen vs. United States, 225 U. S., 227,  
at p. 242.

Luria vs. United States, 231 U. S., 9-24.

United States vs. Spohrer, 175 Fed. 440-448.

Shurman vs. United States, 264 Fed. 917 (9  
CCA.)

United States vs. Kramer, 262 Fed. 395 (5 CCA.)

United States vs. Herberger, 272 Fed. 278.

United States vs. Darmer, 249 Fed. 989.

United States vs. Wursterbarth, 249 Fed. 908.

The affidavit attached to the complaint does not constitute a part of the pleading nor is it evidence. In disposing of this question the trial judge stated the rule to be that—

“Its (the affidavit) office is simply to furnish the District Attorney with a good and sufficient cause for bringing the suit, and when an affidavit states facts which are sufficient to justify the District Attorney in exercising his discretion and bringing the suit, it performs its office.”

The next objection raised by defendant relates to the refusal of the trial court to order the return to defendant of the photographic copies of documents found at his residence and office. These copies were not introduced in evidence.

We think this question is disposed of by the terms of the stipulation voluntarily entered into between the parties, through their respective counsel, in which it was stipulated as follows:

“It is hereby stipulated and agreed by the parties hereto, by their attorneys, that at the



trial of the above entitled cause the facts herein stated shall be taken and deemed to be true; that no evidence thereof shall be required to be offered or produced by either of the parties hereto, and the parties hereby expressly waive any and all objections of every kind as to the manner of proof and as to the sufficiency of the proof of the facts hereinafter stated. All other objections as to the competency, relevancy, and materiality of these facts are reserved. This stipulation may be read at the trial by either of the parties hereto.

The facts herein stipulated are:" (Trans. p. 63). Then follows the stipulated facts and the matters quoted from defendant's diary (Trans. pp. 65, 66, 67), and the only other reservation contained in the stipulation follows:

"Constitutional and statutory rights and objections of defendant in reference to the following letters are reserved."

Then follows copies of various letters (Trans. p. 67), but no further objections were offered.

In defendant's brief it is stated, "At the trial these documents, and particularly a number of letters, were introduced in evidence over the objections of the defendant." (Trans. p. 67.) It will be observed that this is an erroneous statement of fact. No evidence in

relation to the letters was offered other than the stipulated facts. It is true, as claimed by defendant, that defendant went upon the witness stand in his own behalf and also offered the testimony of one Otto Berg. The defendant did not, however, undertake to deny the statements contained in the documents set forth in the stipulation and the only evidence offered by the witness Berg was to the effect that, "He had seen Woerndle fill out many questionnaires and knew that Woerndle had advised two or three aliens or alien enemies to go to war since the United States got in." (Trans. p. 181.)

Aside from the questions as to the void search warrant, the admissibility of the letters under the stipulation, and the copy of the entries in the diary (as to which no reservation was made), the court had power, which it exercised under J. C. Section 262, 5 Fed., Stat. Ann. 2d Ed. p. 928, 36 Stat. L. 1162, to direct the issuance of a subpoena duces tecum for the production of these writings to be used upon trial of the cause.

"The Supreme Court, the Circuit Courts of Appeals, and the District Courts, shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and

agreeable to the usages and principles of law, Id.”

Under this section, authority exists to issue subpoenas, duces tecum, for “the right to resort to means competent to compel the production of written as well as oral testimony” seems essential to the very existence and constitutions of a court at common law.

American Lithographic Company vs. Werckmeister, 221 U. S. 603, 31 S. Ct. 676.

The documents, regardless of the fact that they were first procured under a warrant issued upon an insufficient affidavit, were properly before the court and were receivable in evidence.

It is claimed by defendant that the Act of June 29, 1906, is unconstitutional and void because it is vague, indefinite and uncertain, “and fixes no standard of fraud.”

In so far as the alleged unconstitutionality of Section 15 of the Act is concerned, it is suggested that the position of defendant upon this question is based upon theories which might be pertinent in a criminal proceeding, but the statute under which this suit is brought is not a criminal statute, it simply authorizes the District Attorney to bring a suit to set aside a certificate of naturalization on the ground of fraud,

and it is not void for indefiniteness or uncertainty, as claimed by defendant.

What "standard of fraud" would counsel for the defendant fix in a proceedings of this nature? If defendant procured his certificate of citizenship through false testimony—if he had not renounced and abjured all allegiance, particularly to the Emperor of Germany, when he took and subscribed the solemn assurance of allegiance and fidelity to the United States, and agreed to support its constitution and laws; if he held at that time a mental reservation of allegiance to the German Empire which was superior to his promised allegiance to the United States—then he was guilty of such "standard of fraud" as should deprive him of the very great privileges and advantages of his fraudulently obtained certificate. The law specifies no particular brand or standard of fraud. It does require, however, a standard of citizenship, and in this defendant has shown himself wholly wanting.

It is not the rule, as claimed by the defendant, that a proceeding to cancel citizenship can only be brought in the court granting it, and within the term. Upon this question, we quote the language of the trial judge as follows:

"This position, in my opinion, is negatived by

the provisions of Section 15, which provide that the suit shall be brought in any district where the alien resides and, therefore, in a court other than the one admitting him to citizenship. And it further provides that if the certificate is canceled a certified copy of the order shall be forwarded to the court admitting the alien to citizenship, and that court shall make a record of it, so that it really appears that it was the purpose and intent of Congress that the suit might be brought in any court having jurisdiction."

It is stated in defendant's points and authorities No. 11, that until the United States entered the war in 1917 there was no opportunity or necessity for a naturalized citizen to make a choice or preference in his allegiance.

At the time the United States entered the war and for some time prior thereto, defendant had reason to change his former conduct and attitude and to assume and pretend to possess true allegiance and fidelity to the United States. It is common knowledge that for some time prior to the United States entering the war, Germany had committed so many acts in violation of the rights of the United States and its citizens that only an excess of indulgence and patience on the part of the President of the United



States prevented the actual declaration of war at a much earlier period than that on which the declaration of war was made. Defendant was abundantly aware of the fact that war between the United States and Germany was inevitable. He knew this long before the declaration was made. He stated as early as May 31, 1915, that

“Only God Almighty can save us from war with my own Fatherland.”

The best test, therefore, and the only method by which defendant's true attitude toward the United States could properly be determined was to ascertain what his feelings were prior to the time the United States actually entered the war. Defendant is a lawyer, is shrewd and is a successful business man, and cannot escape the plain meaning of his expressions through a pretext of ignorance or that he did not intend the expressions contained in his diary and letters. In these the defendant expressed his true feelings, and from them can best be determined not only what his attitude was toward the United States during the years 1914, 1915 and 1916, but these expressions furnish the best means of ascertaining defendant's feelings and measuring his allegiance and fidelity to the United States at the time he was admitted to citizenship. It is only reasonable to assume

that since defendant had resided in the United States since the year 1897, had prospered, married a native girl of the United States, and had enjoyed the prosperity and protection offered by reason of residence in the United States, that his allegiance and fidelity towards the United States should be stronger than it was at the time of his admission to citizenship in 1904. As said by Judge Cushman in *United States vs. Herberger* (272 Fed. 278):

“Loyalty or allegiance is, necessarily, of slow growth; therefore, somewhat involuntarily, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may not be fully realized at the time of their naturalization, renders it nonetheless a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter.”

Referring to the Act of June 29, 1906, it is said:

“Congress, therefore, clearly indicated that subsequent acts of a naturalized citizen would be

sufficient evidence of his fraudulent intention at the time of his admission. If mere removal is sufficient evidence of fraud, why not subsequent acts of disloyalty, or statements indicating his want of allegiance? In the nature of things it is impossible for the Government to make more than a cursory examination into the loyalty or general character of the applicant for citizenship before admission, and the court must of necessity rely upon the good faith and truthfulness of the applicant when appearing before it and taking the oath of allegiance. \* \* \* American citizenship is a priceless possession, and one who seeks it by naturalization must do so in entire good faith without any mental reservation whatever and with the complete intention of yielding his absolute loyalty and allegiance to the country of his adoption. If he does not he is guilty of fraud in obtaining his certificate of citizenship. There can be no doubt that, had the defendant in this case been guilty of the utterances with which he is charged, before his naturalization, and that fact had been known to the court, he would not have been admitted." (United States vs. Kramer, 262 Fed. 395.)

"An alien has no moral or constitutional right to retain the privileges of citizenship if, by false

evidence or the like, an imposition has been practised upon the court, without which the certificate of citizenship could not and would not have been issued. \* \* \* The Act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges." (Johannessen vs. United States, 225 U. S. Rep. 227.)

"If, therefore, under such circumstances, for 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country require him to renounce before he could become one of its citizens. Indeed, for the reasons just stated, his allegiance to the former must at that time be stronger than it is at present. Whatever presumption might otherwise arise in his favor from the apparent fact that during the intervening years he has lived as a good citizen of this country is of no weight, when it is considered



that nothing has happened during that time to call forth a manifestation of his reserved allegiance, and that as soon as something did happen—i. e., the war between this country and Germany—he immediately manifested it. \* \* \* If the natural and probable inference to be drawn from a proven fact is the existence of another fact, it makes no difference whether the latter fact be before or after, in point of time, the fact from which the inference is to be drawn. The decisive point is whether the inference is a natural and probable one.” (United States vs. Wursterbarth, 249 Fed. 908.)

What is contemplated by the term “allegiance and fidelity”? Justice Miller in his lectures on the Constitution (Miller, Constitution of the United States), at pages 276, 293, 294 and 297, says:

“There are certain rights, privileges, and duties belonging to a citizen of a State, which do not belong to a foreigner resident within the State. Among these it is said that allegiance and protection are correlative obligations. If you are a citizen then, there are the correlative obligations between yourself on the one side, and the Government on the other. The citizen or subject owes allegiance, which signifies a loyal devotion and support due from him to the government



under which he lives; and, in return, that government owes him protection in a great many ways, too numerous for me to undertake to detail at this time.

The court (the Supreme Court, in the Slaughterhouse cases), in an opinion which I had the honor to deliver, held that the State in its relation to its citizens, and the citizens in their relation to the State, were interchangeably bound with regard to those laws which go to make up the rights which are protected by law; the right of marriage; the right of the descent of property; the right to the control of children; the right to sue for property, and to have it protected; and, in general, the protection of life, liberty, and the pursuit of happiness—these were all founded in the relation between the State and its citizen.

He has a right to look to that Government for protection in all foreign countries wherever he might travel, on the high seas or the sands of Africa, in Europe, or in Australia, wherever a ship floats or a traveller can go. He has a right to call on the United States for protection wherever he may be outside of its lines or territory. He has also the right to travel all over this country free from any tax, assessment, or interrup-

tion in his passage from one part of the country to another. He has the right of petition granted to him by the Constitution of the United States. He has the right to use the mails of the United States; he has, in short, a right to everything which that great Government gives or concedes to anybody, and these are his rights as a citizen of the United States. They are numerous; they are great; they are valuable."

"The spirit in the citizen that, originating in love of country, results in obedience to its laws, the support of its defense and existence, rights, and institutions, and the promotion of its welfare, is called patriotism. (Wise on Citizenship, P. 73.)"

"By allegiance is meant the obligation of fidelity and obedience which the individual owes to the Government under which he lives, or to his Sovereign, in return for the protection he receives. The citizen or subject owes an absolute and permanent allegiance to his Government or Sovereign, or at least until by some open and distinct act he renounces it and becomes a citizen or subject of another Government or another Sovereign." (Carlisle vs. United States, 16 Wall. 147.)

It is evident that when defendant took the oath of allegiance he did not renounce and abjure all allegiance to the Emperor of Germany but that he had a mental reservation of allegiance and fidelity to the German Emperor—an allegiance and fidelity that was greater than his allegiance to the United States. No occasion arose from the time of his admission until October, 1914, calling upon him to give evidence where his true allegiance resided.

Following October 3, 1914, and repeatedly during the years 1915 and 1916, defendant not only gave ample evidence of his allegiance to Germany, but also exhibited a very marked unfriendly attitude toward the United States. In this connection we desire to quote briefly from letters written by the defendant and contained in the stipulated facts. On May 14, 1915, in a letter to his parents, defendant used this language:

“The Americans, mob-like, would be glad if it could get one over on Germany, but the German Michael will not have to be afraid very much. The United States are noisy, but when it comes to do something they are slow. This nation could not force ragged Mexico to salute the American flag. They will not risk to go to Germany. Otherwise, the Japanese may soon

take possession of the best part of their coast, for they have aimed for it a long time." (Trans. P. 130.)

This statement exhibits an attitude fully showing a want of allegiance and fidelity. It shows more than that. It clearly indicates the desire on the part of defendant that in case of conflict between the United States and Germany, which he then expected, that the Germans should win. It indicates a wish on the part of the defendant that in case of war between the United States and Germany the Japanese Government may be arrayed against the United States. This letter was written in May, 1915. In connection with it there should be considered defendant's letter of May 31, 1915, in which he stated:

"And judging from today's evening paper headlines, only God Almighty can save us from war with my own fatherland. It seems now as if the American Government has lost its head, or is about to lose it." (Trans. P. 126.)

It is proper, therefore, to consider the statements contained in the letter of May 14 as having been made at a time when defendant felt that "Only God Almighty can save us from war with my own Fatherland". During the following month, defendant gave vent to the expression:



"I am ashamed of the action of the American nation, for they can never make reparation for it. \* \* \* I wish I had the means, I would be glad to give all to beautiful old Fatherland to aid it in this hour of need. \* \* \* If I were in Germany, as three years ago, I would gladly allow myself to be put in uniform, or otherwise be of benefit to the Fatherland." (Trans. P. 138.)

These expressions leave no doubt as to what defendant's attitude was at this time. They leave no doubt as to his lack of fidelity and allegiance to this Government, and it seems to us that if he was lacking in fidelity after the many years he had resided in the United States and had enjoyed its protection and advantages, that he must necessarily have been wholly wanting in allegiance at the time he gave testimony through which his certificate of citizenship was issued to him. He committed a fraud upon the United States and gave false testimony at the time of his examination. He did not then renounce and abjure allegiance to Germany. He did not then, nor has he at any time since, maintained a true allegiance or fidelity towards the United States.

In a letter dated May 8, 1916, defendant wrote his brother in which he criticised the administration and suggested the possibility of this country entering the war, he stated:



“Here too will not remain one stone upon the other if this comes to pass, for the blood bath which he here prepares will out-top in blackness any shadow which the Angel of Death has ever thrown on Europe. The monster of a President seems not to notice the bloody handwriting on the wall but it will be that much more red when the hour comes.” (Trans. P. 157.)

Defendant admits he knew, as a lawyer, in 1914 he was committing a felony in his acts concerning the Boehm passport. Following this, he repeatedly expressed his allegiance and fidelity to Germany and his contempt for and condemnation of the United States. If, after the long years of residence in and enjoyment of the prosperity and protection given him under this Government, he retained this marked degree of allegiance to his native country and contempt for the United States, it is only reasonable and natural to assume that he committed a fraud upon this Government in the procurement of a certificate of citizenship, which required of him true allegiance and fidelity to this Government and renunciation of allegiance to the German Empire.

Defendant attempts, in his brief, to excuse the language used in the several letters written by him to his relatives and friends in Germany, by claiming that the anti-American and pro-German expressions

were used merely for the purpose of preventing the letters being held up by the German censors. This is too absurd a position to be taken seriously. In the first place, the great difficulty would naturally be encountered with the allied censors who would be the first to scrutinize letters addressed to Germans passing through their hands, and, consequently, it is improbable that there would arise any difficulty with the German censors over letters written by defendant (a German) to his German parents in Germany. There was no call for either pro-German or anti-American expressions in the letters in order to avoid difficulty with German censors. And again, the most important to defendant's parents, and most consoling in terms, of all the letters sent by defendant, was the one dated February 18, 1916 (Trans. P. 151), but this letter contained neither pro-German nor anti-American expressions.

By the time defendant wrote his friend, Hans W. Boehm, under date of July 14, 1916 (Trans. p. 164), it is probable that he had become so thoroughly familiar with German methods of warfare and so fully convinced that this country would soon be involved in the war, that he realized the wisdom of more caution and moderation in the language used in his letters, and consequently there were no further anti-American expressions.

Defendant counsel asks, "Did Woerndle hold a mental reservation as to his allegiance at the time of taking his oath of citizenship in 1904?" (Deft's. Brief P. 63). Practically every expression made by defendant prior to the time the United States entered the war, or was known by defendant to be certain to enter therein, answers defendant's question unmistakably in the affirmative. He not only held a mental reservation of allegiance to Germany but he also held, and frequently expressed, a positive anti-American attitude.

At the close of the oral argument, defendant's counsel stated, in substance, that the real question for determination in this case is whether the defendant, at the time of his admission to citizenship, held a mental reservation of allegiance to Germany. We also think this is the true question and the only serious question for determination on this appeal.

The trial Judge based his judgment, in denying the Government's complaint, upon the theory that the evidence must disclose some act or statement indicating allegiance to, or sympathy with, Germany after the entry of the United States into the war. (Trans. P. 116.)

It would seem, however, that the true attitude of defendant at the time of his admission in 1904 could

be most accurately determined from defendant's expressions during the years 1914, 1915 and 1916, and when he was not placed upon his guard or was not possessed of any thought of any harm or disadvantage coming to him from the expressions contained in his private diary, and from the letters written to his friends and relatives in Germany, and when he did not fear the consequences of an investigation then being conducted by the Government.

It is claimed that defendant voluntarily testified and submitted himself to unreserved cross examination, covering most of the stipulated facts, to enable the Court to form its opinion on the main facts, etc. (Deft's. Brief P. 15.) Defendant is charged with having secured his certificate of citizenship through fraud, deceit and false testimony. He professes a desire to have the Court know the whole truth. This being a suit in equity, the Court is entitled to know the whole truth. The truth in this proceeding can be ascertained only from the diary and letters which defendant is making such persistent effort to keep from the Court. These documents tell the true story of Mr. Woerndle's allegiance and of his mental attitude at, and subsequent to, the time he obtained his certificate.

We cannot emphasize too strongly that Woerndle's conduct is not stripped of probative effect mere-



ly because its date is prior to 1917, and the American entry into the war.

We urge the court to remember that in heart and mind Woerndle was a belligerent as between the United States and Germany. He fixed his own status and attitude as a belligerent by his letters stating that war between the United States and Germany was such a certainty as only God Almighty could prevent.

Many citizens from 1914 to 1917, expressed opinions on the merits of the European war. They chose their parties—in common parlance they took sides. They were mere spectators with no thought of American participation. They stood on the side lines and cheered their favorites. But Woerndle was not one of these. He was no mere spectator. He saw America as a participant in the war against Germany; the America that he for two years condemned, ridiculed, and denounced was in his eyes the enemy of Germany. In his heart he enlisted under the German colors in a German-American war.

His was not merely the enthusiasm of an interested spectator, but rather the fighting hatred of a combatant, the wish to injure, to see America crushed, torn, and bleeding like Belgium then was, so that "here too there would not remain one stone up-



on the other," and that she would lie sweltering in the blood bath that would "out-top in blackness any shadow which the Angel of Death had ever thrown on Europe."

Defendant makes the rather extraordinary statement that "Neither in the diaries or in the other mass of documents was the Government able to find a single thought, action or utterance derogatory to the United States, either before, during or after the war," and defendant attempts to support this statement by quoting from the trial judge's opinion. Certainly Judge Bean's decision supports no such statement. Judge Bean does say that there was no evidence of defendant's disloyalty to the United States prior to the commencement of the war between England and Germany—1914—(Trans. 115) or subsequent to the time the United States entered the war—April 6, 1917 (Trans. 116). Judge Bean unqualifiedly condemns defendant for his felonious conduct relating to the Boehm passport and says in his opinion, in relation thereto, that "Defendant's conduct is, of course, indefensible" (Trans. 116).

If the trial court was correct in the position that it was incumbent upon the Government to show that defendant had committed acts of disloyalty after this country had declared war upon Germany, then we

concede that the court was correct in its decree dismissing the Government's suit, but, if it has been satisfactorily shown by the conduct and expressions of defendant, made at any time after the hearing of his petition for citizenship, that he held a mental reservation of allegiance to his native country and that his testimony, and oath of allegiance to the United States were false, then we feel that the prayer of the complaint should be granted.

The testimony offered by the defendant at the hearing of his petition for citizenship was false; he deceived the court that granted him his certificate; in his heart he remained a German; his true allegiance was at all times with Germany; he was anti-American. He ought not to be invested with the rights and powers of American citizenship.

If Woerndle's attitude toward the United States constituted true allegiance—if this is fidelity—then Bernstorff should receive the apologies of this nation, and open and professed anarchism is not without real virtue.

Respectfully submitted,

JOHN S. COKE,  
United States Attorney.

IN THE  
**United States Circuit Court**  
**of Appeals**

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,  
Plaintiff, Appellant,

vs.

JOSEPH WOERNDLER,  
Defendant, Respondent.

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**REPLY BRIEF OF RESPONDENT**

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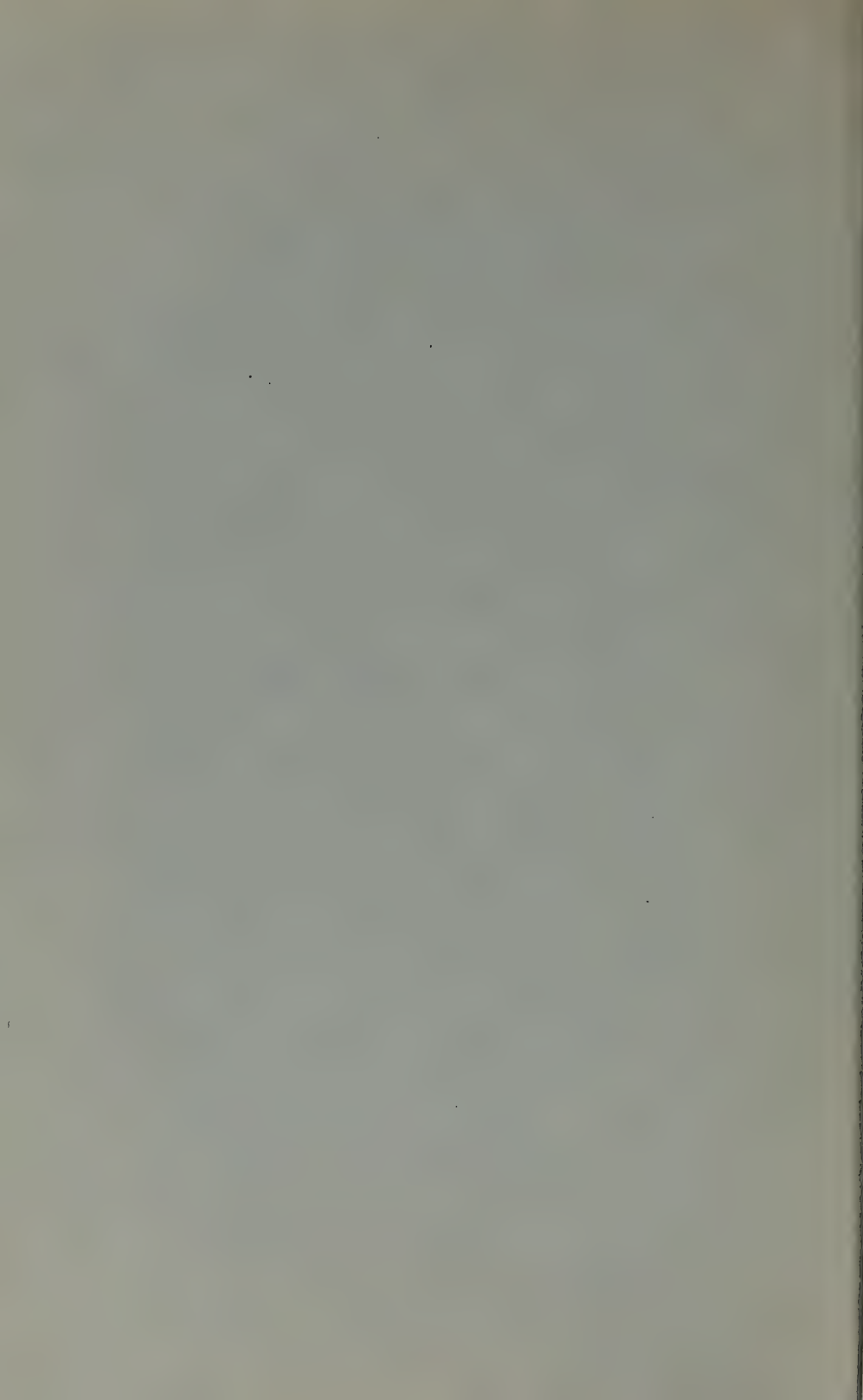
Upon Appeal from the United States District Court  
for the District of Oregon.

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JOHN S. COKE,  
United States Attorney for Oregon,  
for Appellant.

C. T. HAAS,  
Attorney for Respondent.

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IN THE  
**United States Circuit Court  
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Defendant, Respondent.

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**REPLY BRIEF OF RESPONDENT**

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Upon Appeal from the United States District Court  
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JOHN S. COKE,

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Attorney for Respondent.

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## ARGUMENT.

After the hearing of the within case before this Honorable Court on February 9th, counsel for the appellant asked for thirty days' additional time in which to file a reply brief to answer new matter set forth in respondent's brief. This time was granted appellant, and respondent was given fifteen days thereafter in which to file his reply brief.

Respondent's understanding of the practice of this Court is that a reply brief is only to answer new matter raised in opponent's brief. With this understanding in mind counsel has vainly searched appellant's reply brief for any answer to new matter, and with few exceptions has found only a repetition of arguments and quotations from appellant's original brief herein. For example, the long quotations found on pages 13, 14 and 15 of his reply brief are also found almost verbatim on pages 57, 55 and 73 of his original brief. The excerpts from the letters quoted in the reply brief have also all been quoted at least once, and some several times, in his original brief.

Points VIII and XIII of respondent's brief which are of some importance were not mentioned in appellant's original brief and are also not mentioned in his reply brief.

The first of these points, "That the admission of the letters of the defendant and all of them over the further objections of the defendant as to their inadmissibility on the ground of their not being

competent, relevant or material was improper as no complaint in this connection of any action of the defendant is made in the bill of complaint or the affidavit attached thereto," etc., was only referred to by appellant on page 5 of his reply brief, wherein he states: "The complaint does not solely rest as claimed by defendant, upon fraudulent acts of defendant with respect to the passport secured for and delivered to Hans W. Boehm, but it is based upon alleged fraud and false testimony given by the defendant in his naturalization proceedings, the evidence of which is shown in his various acts and written statements, commencing with the procurement of the Boehm passport in 1914 and extending thru the years 1914, 1915 and 1916."

An examination of the complaint and affidavit attached thereto absolutely fails to reveal anything but the passport matter and even in this the Government voluntarily admitted in open court that with the exception of the October 1914 passport, Woerndle had no knowledge of any of the other actions of Boehm as set forth at great length in the affidavit (Transcript, p. 121, where in referring to these matters the Statement of Evidence states "all of which, however, was done without the actual knowledge of the defendant Woerndle" and three lines below on the same page in referring to another passport "also without the actual knowledge of the defendant Woerndle.") How then under these facts, of which there can be no question, can counsel for the Government state in his reply brief "that the

complaint does not solely rest as claimed by the defendant upon the fraudulent acts of the defendant with respect to the passport secured for and delivered to Hans W. Boehm, but it is based upon alleged fraud and false testimony given by the defendant in his naturalization proceedings, the evidence of which is shown in his various acts and written statements, commencing with the procurement of the Boehm passport in 1914 and extending thru the years 1914, 1915 and 1916."

Another point made by the respondent which the appellant did not contradict or deny in any way whatsoever, either in his reply brief or in the arguments before this court, is point III, to-wit: "As a matter of fact and of law the defendant at the time of taking his oath of citizenship owed and had no allegiance to Germany by reason of his having voluntarily expatriated himself and having given up his rights as a German citizen and therefore could not have had a mental reservation as to his allegiance."

(Defendant's Exhibit "A," Transcript, p. 172.)

If silence gives consent then surely appellant's silence at all times on this point may mean acquiescence in the logic thereof.

Neither does appellant apparently find any cause of disagreement with the only two cases in the authorities under somewhat similar proceedings, which hold that actions of persons occurring prior to our entrance into the war are not such as could or would indicate a choice of allegiance, as between

the United States and any of the belligerents. In re Watkiss, 269 Fed. 466, and In re Cluny, 269 Fed. 464.

Respondent also disagrees with proposition Number 7 as stated on page 3 of appellant's reply brief, and in order to avoid unnecessary repetition, respectfully refers to pages 19 to 21 of respondent's brief for his contention in this respect.

Appellant on page 7 of his reply brief states: "In defendant's brief it is stated 'At the trial these documents and particularly a number of letters were introduced in evidence over the objections of the defendant (Transcript, p. 67).' It will be observed that this is an erroneous statement of fact."

In view of this statement we respectfully refer the Court to the Statement of Evidence duly signed by the trial court, which we believe should be conclusive of this matter (Transcript, p. 171), wherein it is stated "That all of the letters heretofore quoted....were admitted subject to the objection of the defendant that the same were incompetent, irrelevant and immaterial, and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in violation of the 4th and 5th Amendments to the Constitution of the United States." Regardless of any stipulations, regardless of any statements of counsel or anything else, here is the record on this subject, certified to without any objection by the trial court



and we believe the same will be given the credence to which it is justly entitled.

Apparently the defendant's exhibition of active loyalty to the United States during the war and for some time prior thereto, is a great disappointment to the Government, at least those who should most appreciate such action on behalf of one in defendant's position, are most ungenerous in giving him any credit therefor and admit his loyalty not because they want to be fair and just, but because they have no other choice. Instead of being just and saying without hesitation that there is no question of defendant's absolute loyalty to the United States from some time prior to July, 1916 (nearly a year before the United States entered the war), they say on page 23 of their brief: "By the time defendant wrote his friend Hans W. Boehm under date of July 14th, 1916 (Transcript, p. 164) it is probable that he had become so thoroughly familiar with German methods of warfare and so fully convinced that this country would soon be involved in the war, that he realized the wisdom of more caution and moderation in the language used in his letters and consequently there were no further anti-American expressions."

The Court will recall that this is the letter in which defendant referred to (Germany) as "the country second dearly loved by us all" (Transcript, p. 164), and as heretofore said if Germany was then only "second" in defendant's love, it would almost conclusively indicate that the "first" place of



love for the United States had never been usurped. This letter was written long prior to even any thought of any investigation of defendant's part in the passport matter, nor was there any evidence or even any claim of anything but the highest loyalty to the United States on the part of the defendant for some time prior to the date thereof down to the present writing, but the appellant is not fair enough to honestly admit these facts but maintains that this Court should only consider those actions of the defendant which they maintain show disloyalty and that he is not to be given the benefit of anything which would show the contrary. In short, the Government maintains that from certain alleged proven facts of defendant's action in 1914 and 1915 a natural and probable inference can be drawn that other facts existed, to-wit: that defendant had a mental reservation in favor of Germany in his oath of citizenship at the time of his naturalization in 1904. For the sake of the argument only admitting that this position is correct, then in that case other actions of the defendant occurring after the acts of 1914 and 1915 are admissible and proper to rebut or disprove any presumption that may have arisen from the prior acts and therefore the actions of the defendant showing his positive and active loyalty to the United States from 1916 up to the time of the filing of the complaint herein are worthy of serious consideration and in our opinion are sufficient and strong enough to overcome any presumption or inference which

might otherwise have been attributed to or have been drawn from the acts of 1914 and 1915. In other words, the Court is not confined solely to the consideration of inferences to be drawn from any particular acts of the defendant in 1914 or 1915, but must consider all facts and acts of the defendant presented to the Court occurring prior to the filing of the complaint, and only in this way can the Court arrive at a correct and just conclusion. In addition thereto the words of caution contained in the statement of Judge Hunt of this Honorable Court in *Schurman vs. United States*, 264 Fed. 919, are full of wise admonition for a trial court in the determination of matters of this kind, to-wit: "Courts should be very careful to avoid depriving one of citizenship upon evidence which, while proving lack of allegiance at the time of the investigation, may not by relation establish that there was lack of true faith and allegiance at the time of the issuance of the certificate to the applicant."

Appellant on page 27 of his reply brief states: "If the trial court was correct in the position that it was incumbent upon the Government to show that defendant had committed acts of disloyalty after this country had declared war upon Germany, then we concede that the Court was correct in its decree dismissing the Government's suit." While the Court perhaps would have been justified in taking such a position, still the fact remains that appellant's statement as to the position of the trial court is entirely at variance with the true position

taken by the trial court, and all that is necessary to prove the error of appellant's statement, is to refer to the opinion of the trial court itself, which shows that as a matter of law and fact the acts complained of were not considered disloyal and were not considered sufficient to justify the inference of mental reservation (Transcript, p. 115), where the court stated in its opinion: "But it is contended by the Government that defendant's attitude during the latter part of 1914 and the years 1915 and 1916 was such as to show by relation that he swore falsely in 1904 when he declared that he absolutely and forever renounced all allegiance and fidelity to the German Government."

"The evidence relied upon to sustain this position consists of information obtained from private memoranda of defendant and copies of private letters written by him to his relatives in Germany, which were obtained by an unlawful search of his home and office by officers of the Government in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and which documents on his application were by the Court ordered returned to him, without objection by the Government. The evidence so obtained would not be admissible on a criminal trial, and I am in doubt whether the Government should be permitted to profit in this proceeding by knowledge so obtained."

"But, however that may be, it is not sufficient in my judgment to show that the defendant did not, in 1904, honestly and in good faith renounce and ab-

jure allegiance and fidelity to Germany. It all relates to his acts and statements in private letters and memoranda after the commencement of the war between Germany and England and several months prior to the time the United States became involved therein. It should be interpreted in the light of this fact and not that of subsequent events."

Does this justify the statement made by appellant heretofore referred to as to the court's position in the matter? The court could scarcely have made its position clearer and squarely gives its judgment on these facts and thereafter and after making the above statement and to show that no additional facts detrimental to the defendant have been proved, the court continues: "There is no evidence of a single act, statement, or conduct indicating allegiance to or sympathy with Germany after the entry of the United States into the war, but all the evidence is to the contrary."

Respondent scarcely knows how to comment upon the concluding paragraph of appellant's reply brief, especially in view of the fact that it states no legal conclusion or argument, but can only be considered as a reflection upon the opinion of the trial judge who heard the facts and dismissed the Government's complaint. We feel that the trial court's opinion does not merit such a comment, but believe that this concluding paragraph was written by counsel for the Government without sufficient reflection as to how it would be interpreted, and for this reason will say no more about it.

In conclusion respondent respectfully submits that as a matter of fact and of law and upon an entire consideration of all of the evidence herein, the trial court was clearly justified in dismissing the Government's complaint, and we respectfully maintain that this action of the trial court should be affirmed.

Respectfully submitted,

C. T. HAAS,

Attorney for Respondent. *MS*







